TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 164

JUAN G. GALLARDO, APPELLANT,

vs.

SANTINI FERTILIZER COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT UNDER THE ACT OF SEPTEMBER 14, 1922

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[fol. 1]

IN UNITED STATES DISTRICT COURT. DISTRICT OF PORTO RICO

Equity. No. 1266

SANTINI FERTILIZER COMPANY, Complainant,

vs.

JUAN G. GALLARDO, Defendant

BILL OF COMPLAINT. Filed June 10, 1924

To the Hon. Arthur F. Odlin, Judge of the District Court of the United States for Porto Rico:

Now comes Santini Fertilizer Co., the complainant above named, by its undersigned solicitors and brings this its bill in equity for an injunction against the defendant and for cause of action in equity alleged:

1. That the complainant is a corporation duly organized and existing under and by virtue of the laws of the Island of Porto Rico and is a citizen and resident of and domiciled in said Island of Porto Rico.

2. That the defendant Juan G. Gallardo, is a citizen of the United States and of Porto Rico, domiciled in and a resident of the Island of Porto Rico.

3. That the amount in controversy in this suit exceeds the sum of $3,000, exclusive of interest and costs.

4. That the defendant Juan G. Gallardo is the Treasurer of Porto Rico duly appointed and qualified and at all times hereinafter mentioned was, and now is, acting as such Treasurer of Porto Rico.

5. That the complainant is now and for several years last past has been engaged in the business of buying and importing from the States of the United States and from [fol 2] foreign countries fertilizers and raw materials therefor, and in manufacturing commercial fertilizers, and in selling raw materials and the manufactured product.

6. That heretofore and in the spring of 1923 complainant duly filed a property tax report for the fiscal year 1923-24 showing its taxable assets to be as follows:

Cash	1,896 95
Furniture, fixtures and automobiles	3,667 16
Raw materials for industrial purposes actual average	126,631 00

That subsequently, and in the latter part of the year 1923 defendant's predecessor assessed the taxable property of complainant in the sum of $365,360.00, this total being made up of an item of $2,060.00 for cash alleged to be on hand on January 15, 1923, and $362,610.00 for tangible personal property alleged to be on hand on January 15, 1923. Said sum of $362,610.00 is made up principally of one item of $286,761.00 the alleged value of merchandise in the hands of complainant in San Juan on January 15, 1923.

7. That in the business of the complainant it is necessary to keep on hand an exceptionally large stock in the months of January and February of every year to meet orders for fertilizer at that period of the year. The sum of $286,761.00, the alleged value of stock in trade on January 15, 1923, does not represent the average market value of complainant's stock of materials or merchandise during the year next preceding the time of the assessment, but on the contrary such average market value of complainant's stock of materials or merchandise during the year next preceding the time of the assessment was $126,631.00 as reported in the property tax report filed by complainant as above set forth.

8. That part of the stock on hand on January 15, 1923 [fol. 3] alleged by defendant to have been worth $286,761.00 consisted of 122 tons of nitrate of soda of the value of $6,710; 146 tons of sulphate of potash, of the value of $7,154; 180 tons of muriate of potash, of the value of $7,182; 74 tons of French precipitated bone meal, of the value of $2,256 and 31 tons of cotton seed meal, of the value of $1,879, aggregating in all $26,181, all of which merchandise on January 15, 1923 was on the dock and warehouse of the complainant in the City of San Juan in the original bags

in which same had been imported from Germany and France by complainant and which consequently retained its character of imports from foreign countries and was at the time exempt as such from any property or other taxes imposed or which could be imposed by the government of Porto Rico.

9. That complainant duly appealed to the Board of Equalization and Review from the assessment referred to hereinabove in paragraph 6, but that the assessment was confirmed by the Board of Equalization and Review upon the ground that it appeared that on January 15, 1923, the value of the property in the hands of complainant was as assessed by defendant's predecessor as Treasurer. That no appeal or other review of the action of said Board of Equalization and Review is provided by the laws of Porto Rico.

10. That on January 15, 1924, complainant had on its dock and in its warehouse in San Juan, Porto Rico, a stock of merchandise greatly in excess of the average market value of complainant's stock of material or merchandise during the year next preceding the time of the assessment of the property tax for the year 1924-25, and defendant threatens to assess the same according to its value on January 15, 1924, rather than its average market value [fol. 4] during *during* the year next preceding and furthermore threatens to include in said assessment merchandise in the hands of complainant on January 15, 1924, in the original packages in which the same has been imported by complainant from foreign countries and which had not yet become mingled in the local commerce of Porto Rico.

11. That subsequently to said decision of the Board of Equalization and Review and on May 19, 1924, defendant, through its agents and employees, has demanded of complainant the payment of an alleged 1923-24 property tax on said assessment of $265,500.00 amounting to $6,844.56, and upon the failure of complainant to pay the whole of said alleged tax said defendant through its agents and employees threatens to attach, seize, embargo and sell sufficient property of complainant for the purpose of collecting

from the proceeds thereof the said alleged tax or any unpaid portion thereof.

12. That said defendant in taking the action and making the threats hereinbefore referred to purports to be acting by virtue of the Political Code of Porto Rico and more especially Sections 294, 295 and 297 thereof. Section 294 thereof reads in part as follows:

"So much of the property of any manufacturer, merchant or tradesman as may consist of stocks of material or merchandise shall be listed separately and assessed upon its average market value during the year next preceding the time of assessment. * * *"

and said Sec. 295 provides in part:

"* * * That as soon after January fifteenth of each year as is possible it shall be the duty of the assessor of each assessment district to fill out an assessment schedule showing in detail each separate piece of real property and improvements thereon, and in as great detail as is practicable all personal property subject to taxation within the same municipality belonging on January fifteenth to each taxable person whose property has not been previously assessed or whose property, in the opinion of the assessor, should be revalued or assessed for purpose of taxation. * * *"

[fol. 5] and Section 297 provides:

"That all personal property within or without Porto Rico shall be assessed to the owner thereof in the municipality in which he resides on the fifteenth day of January, except that such personal property as goods, wares, merchandise, and other stock in trade, machinery employed in any branch of manufacturing or business, including machines leased or operated under a stipulation providing for the payment of a royalty; horses or other livestock and all other personal property having a permanent location within a municipality shall be assessed to the owner in the municipality in which it is thus situated; and that shares of banks doing business in Porto Rico shall be assessed to their owners in the municipality where the banks are situated, as hereinafter provided."

13. That acts done or threatened to be done as hereinbefore set forth are illegal and without warrant of law in that the Political Code under which defendant purports to act provides for the assessment only of the average market value of the stocks of material or merchandise of any manufacturer, merchant or tradesman during the year next preceding the time of the assessment, whereas defendant has assessed the alleged market value of complainant's stock of material or merchandise on hand on January 15, 1923, said alleged market value on January 15, 1923, being in excess of said average value to the extent of $170,130. Said acts done or threatened to be done are furthermore illegal and without warrant of law in that said Political Code as construed by the taxing officers of the Government purports to tax goods imported from foreign countries while still in the original packages in the hands of the original importer and before the same have become mingled in the commerce of the Island of Porto Rico; all of which is in violation of the Constitution of the United States, and especially of paragraph 3 of Section 8 of Article I thereof.

14. That the property tax rate for the City of San Juan for the fiscal year 1923-24 is 2.24%. That the property tax at the lawful rate on an assessment of $205,580 amounts to $6,844.56. That the tax on an assessment of $155,430 [fol 6] would amount to only $3,483.63. That complainant on May 29, 1924, duly tendered to defendant the sum of $3,483.63 for its property taxes for the fiscal year 1923-24 and that defendant then refused and now refuses to receive said sum. That complainant is ready and willing at any time to pay said sum to defendant and the only taxes complainant has refused or refuses to pay is the sum of $3,361.93 which complainant alleges to be in excess of the lawful tax.

15. That assessments for two years have already accrued under the view taken by defendant and assessments for further years will present the same question as that involved in the assessments for said two years; that the taxes levied for different years are payable at different times and the taxes for each year are payable in two installments and suits to recover damages from defendant, in case such remedy is not barred by Act No. 17 of 1920, hereinafter referred to, would require a multiplicity of actions

at law; that an embargo of complainant's real property would cloud the title thereof; that the embargo of furniture and fixtures would interrupt the business operations of complainant, and damage complainant in an amount which could not be ascertained in an action at law; that the embargo of merchandise would render it impossible for complainant to meet its contracts of sale and would damage complainant in an amount which cannot be ascertained in an action at law. That complainant has no complete or adequate remedy at law in the premises and that the acts of defendant in requiring complainant to pay the said excessive tax and in making embargoes of complainant's properties in default of the said payment of said excessive tax and the sale of complainant's property pursuant to such embargo would, unless enjoined by this Honorable Court, as a Court of Equity, cause irreparable injury to the com- [fol. 7] plainant herein in that defendant is threatening to and would deprive complainant of its property without due process of law and for the reasons set forth hereinafter in this complaint.

18. That the provisions of Act No. 17 of the Legislature of Porto Rico, approved May 12, 1920, do not afford the complainant an adequate remedy to recover taxes illegally, excessively or wrongfully assessed, and are inadequate for the following reasons:

(a) That under the provisions of said Act, all moneys collected as taxes which are illegally, excessively or wrongfully assessed and whether or not paid under protest are converted into the general revenues of the Insular Government and are required by said Act to be applied to the obligations of the Treasury of Porto Rico, and the part of the amount so illegally collected appertaining to the respective municipalities is required to be turned over to them and moneys paid under protest by taxpayers are not held in a special trust fund;

(b) That a tax payer against whom taxes have been illegally, excessively or wrongfully assessed in the event of a final judgment in his favor, has no means of recovering the amount of said judgment by mandamus against the Treasurer or otherwise, except by the inclusion of the same in the budget and appropriation therefor by the

Voluntary Act of the Legislature of Porto Rico, which action is not controllable by any court and which it is at liberty to take or not as it shall see fit;

(e) That the remedy said to be provided in said Act No. 17 is subject to the obtaining of a certificate from the Treasurer setting forth that the tax payer has paid all his or its taxes and no method is provided for compelling the [fol. 8] delivery of such certificate by the Treasurer within the fifteen day time limit within which a suit for the recovery of taxes under said Act may be filed;

(d) That subdivision 6 of said Act provides that if at any time The People of Porto Rico shall show through a certificate issued by the Treasurer that the taxpayer complainant has not paid any other tax due subsequently thereto within the time fixed by law, he shall be deemed to have withdrawn his suit with costs and shall be obliged to pay an amount to be fixed by the decision of the court in which the action is pending by way of indemnity to the People of Porto Rico for such work as may have been done in the suit by the attorney for said People of Porto Rico as if he had been a private lawyer; that under the terms and provisions of said Act No. 17 a tax payer from whom an illegal tax has been wrongfully extorted may thereby be deprived of all rights and remedies to recover moneys as taxes illegally, excessively or wrongfully assessed through failure for any cause to pay any subsequent tax of any kind and in whatever amount when it become due;

(e) That the certificate referred to in subsection (d) immediately preceding is held to be conclusive by the Insular Courts of Porto Rico and there is no method provided by law by which the truth or validity of such certificate may be ascertained;

(f) That the remedy said to be provided by said Act No. 17 is a remedy at law in the Insular Court of Porto Rico only and not in the United States District Courts of Porto Rico, and non-residents of the Island of Porto Rico are thereby unlawfully and improperly excluded from the United States District Court for Porto Rico;

[fol. 9] (g) That said Act No. 17 by necessary implication excludes personal action against the Treasurer of Porto

Rico for the recovery of taxes illegally, excessively or wrongfully assessed and collected.

That no remedy at law other than said Act No. 17 of 1920 is provided by the laws of Porto Rico for the recovery of taxes or charges, other than income taxes, illegally, excessively or wrongfully assessed and collected.

Wherefore, inasmuch as complainant is without adequate remedy at law, or except in a court of equity, for the wrongs and grievances herein complained of, complainant prays that the due and lawful property tax of complainant for the fiscal year 1923-24 be adjudged and decreed to be $3,033.63, and no more, and that defendant herein be perpetually enjoined and restrained from assessing against complainant or its property any alleged property tax for the fiscal year 1923-24 in excess of said sum of $3,033.63 and from assessing against complainant for the fiscal year 1924-25 and subsequent years any property tax on its stock of materials or merchandise in excess of that at the lawful rate based on the average market value of said stocks of material or merchandise during the year next preceding the time of assessment and from assessing against complainant for the year 1924-25 or subsequent years any property tax upon fertilizers or other goods in the hands of complainant in the original packages in which the same were imported by complainant from foreign countries; and that pending the determination of this cause upon final hearing, a temporary injunction be issued herein enjoining the defendant as aforesaid; and complainant further prays that a writ of subpœna be issued out of and under the seal of this court directed to said defendant commanding him [fols. 10-12] within a fixed period to appear and true answer make to each and every of the matters and things hereinbefore set forth, but not under oath, an oath being hereby expressly waived; and that complainant may have and recover its costs and charges in this behalf expended. And complainant further prays that such other and further and general relief be granted to the complainant in the premises as the Court shall deem meet and proper under the circumstances.

San Juan, Porto Rico, June 10, 1924.

O. R. Frazer, Nelson Gammans, Solicitors for Complainant, by Nelson Gammans.

Duly sworn to by Victor Braegger. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 8, 1924

Now comes the Attorney General of Porto Rico and undersigned counsel, in behalf of the defendant, and in answer to the bill of complaint herein filed, respectfully allege:

1. That defendant admits paragraphs 1, 2, 3, 4, 5 and 6 of the complaint.

2. That defendant denies each and every allegation of paragraph 7 of the complaint, otherwise alleging that in order to assess the personal property of complainant, the stock in hand on January 15, of each year is taken as a basis and the value of same is ascertained by determining the average value of said merchandise in the market during the year preceding the date of assessment.

3. For lack of information, defendant denies each and every allegation of paragraph 8 of the complaint, and especially defendant denies that said merchandise was assessed while in route; and otherwise allege that the tax in this case was levied and assessed after the merchandise was in the hands of the taxpayer and when it had become part of its property, said merchandise being ready to be used in the business carried out by complainant.

4. Defendant admits paragraph 9 of the complaint.

5. Defendant denies each and every allegation of paragraph 10 of the complaint, and especially that any attempt has been made by defendant to assess merchandise in the hands of complainant which were not liable to taxation; otherwise alleging that the assessment levied and collection intended were levied on merchandise already belonging to the property of plaintiff and under his absolute control.

[fol. 14] 6. Defendant admits paragraph 11 of the complaint, but alleging that the action taken was authorized by the laws of Porto Rico.

7. Defendant admits paragraph 12 of the complaint, but inserting the sections quoted in full, as follows:

"Sec. 294. So much of the property of the manufacturer, merchant or tradesman as may consist of stocks of material or merchandise shall be listed separately and assessed upon its average market value during the year next preceding the time of assessment; and the assessor may in assessing such stocks require of such manufacturer, merchant or tradesman to produce the last inventory thereof, and if in the judgment of the assessor the same is not correct, or if such time has elapsed since the inventory was taken that it shall have ceased to be reliable as to the value thereof, and such merchant or tradesman should not produce a new inventory within ten days thereafter, or if the assessor does not consider the last inventory to be reliable, then the assessor shall appraise the said stock by personal examination.

"Sec. 295. That the assessment of property, as the same appears on the tax roll last prepared, shall, after it has been corrected, amended and revised, as herein provided for, constitute the assessment roll for the next fiscal year. That as soon after January fifteenth of each year as is possible it shall be the duty of the assessor of each assessment district to fill out any assessment schedule showing in detail each seperate piece of real property and improvements thereon, and in as great detail as is practicable all personal property subject to taxation within the same municipality belonging on January fifteenth to each taxable person whose property has not been previously assessed or whose property, in the opinion of the assessor, should be revalued or reassessed for purposes of taxation, or the revaluation of which has been requested by the owner thereof or by the municipal authorities of the municipal district in which said property is located, or by any citizen of Porto Rico. Where the same person owns taxable property in more than one municipality, separate schedules shall be made out of each municipality. The assessor may deliver such bank schedule or schedules to which may be attached such interrogatories as he deems necessary in order to secure discovery of taxable property and its value, to any taxable person in his district, or to any adult member of his household or business establishment,

and require said taxable person to issue and make proper receipt for such schedule and return the same to him, properly filled out, within a period not to exceed ten days, and it shall be the duty of said taxable person to make upon said schedule or schedules a complete return and full valuation of all the real and personal property owned, held or possessed by him and liable to taxation, and return same to said assessor within the period of time hereinbefore appointed. Every partnership, concern, trustee, administrator, guardian, agent, and every person having any manner of title, either legal or equitable, or having pos- [fol. 15] session of, holding or claiming in any manner, anything required to be returned in said form or schedule shall be held subject to the provisions of this title and shall be required to make return upon said schedule as herein provided. Whenever property is owned, held, or possessed by more than one person as administrator, executor, trustee, or in any other fiduciary or representative capacity, any one of them may make the oath required by Section 300 of this title, and every schedule of copartnership property shall be sworn to by, at least, one member of the copartnership. The assessor, however, shall not be bound in any manner, by the list of the property or the value placed thereon as thus returned by a taxpayer, but shall proceed upon the information thereby obtained, and such other information as he may be able to obtain, to assess the property at its actual value, without looking to a forced sale, according to his best information and belief.

"Sec. 297. That all personal property within or without Porto Rico shall be assessed to the owner thereof in the municipality in which he resides on the fifteenth day of January, except that such personal property as goods, wares, merchandise, and other stock in trade; machinery employed in any branch of manufacturing or business, including machines leased or operated under stipulation providing for the payment of a royalty; horses and other livestock, and all other personal property having a permanent location within a municipality shall be assessed to the owner in the municipality in which it is thus situated; and that shares of banks doing business in Porto Rico

shall be assessed to their owners [illegible] the municipality where the banks are situated, as hereinafter provided."

8. Defendant denies each and every allegation of paragraph 13 of the complaint, and especially the statement that the acts of defendant were illegal or without warrant of law, otherwise alleging that said taxes were assessed and levied on stock belonging to the plaintiff when the same were in its possession and complete control having become part of the mass of property of plaintiff and could not be considered in router and furthermore answering, defendant alleges that the personal property of complainant was assessed according to Section 294 of the Political Code of Porto Rico, by determining the stock on hand on January 15, 1923 and finding out the average market value of said merchandise during the preceding year.

[fol. 16] 9. Defendant accepts paragraph 14 of the complaint, except as to the allegation that the only amount due is the sum of $3,033.63, otherwise alleging that the amount of taxes properly due and collectible is $6,844.56, and that the amount of $3,033.63 tendered by plaintiff to defendant has been received under stipulation and without prejudicing the rights of the parties.

10. Defendant denies each and every allegation of paragraph 15 of the complaint and especially that the collection of the taxes would require a multiplicity of actions or would in any way cloud the title of complainant; or would damage its business or cause an irreparable injury, depriving complainant of property without due process of law.

11. Defendant denies each and every allegation of paragraph 16 of the complaint, and otherwise allege that Act No. 17, approved May 12, 1920, has been repealed by the legislature of Porto Rico, and that a new law of payment under protest has been enacted and under said law complainant has an adequate, sufficient, complete and clear remedy, and is able to bring an action to recover taxes paid, either in Federal or Insular Courts, the money paid being deposited in a trust fund until the termination of the suit.

Wherefore defendant prays the court to enter judgment dismissing the petition for injunction filed, with costs and

attorney's fees, and any other remedy that the court may deem meet and proper.

San Juan, P. R., June 25, 1924.

H. P. Coats, Attorney General of Porto Rico, by J. A. Lopez Acosta, of Counsel.

Copy received this 27th day of June, 1924. O. B. Frazer, Attorney for Complainant.

[fol. 17] In United States District Court

Opinion—Filed March 23, 1925

Odlin, J.:

This bill in equity seeks an injunction against the assessment of the complainant's stock of merchandise in a greater amount than the average value of the stock during the preceding year. The basis upon which the injunction is sought consists in the claim that the attempt to collect the sum of $6,844.56 instead of the correct amount of $3,033.63 is in effect confiscatory and operates to deprive the complainant corporation of its property without due process of law. It will be observed that there is no question here of domicile, it being admitted that the complainant is a corporation organized under and by virtue of the laws of Porto Rico, and that the defendant is the Treasurer of Porto Rico, domiciled in this Island.

There is therefore involved the sum of $3,810.93, which the defendant claims as lawfully due from the complainant, thus conferring jurisdiction upon this court.

An answer was filed on June 27, 1924, evidence has been taken, and the question thoroughly argued by counsel.

In order to decide the issue, this court must determine the proper construction to be placed upon Par. 294 of the Political Code of Porto Rico, which reads as follows:

"So much of the property of the manufacturer, merchant or tradesman as may consist of stocks of material or merchandise shall be listed separately assessed upon its average market value during the year next preceding the

time of assessment; and the assessor may in assessing such stocks require of such manufacturer, merchant or tradesman to produce the last inventory thereof, and if in the judgment of the assessor the same is not correct, or if such time has elapsed since the inventory was taken that it shall have ceased to be reliable as to the value thereof, and such merchant or tradesman should not procure a new inventory within ten days thereafter, or if the assessor does not consider the last inventory to be reliable, then the assessor shall appraise the said stock by personal examination."

[fol. 18] I do not find it necessary to set forth in this opinion all the various decisions relied upon by the litigants in this controversy. These various decisions have been examined by me, and I have been most impressed by a decision of the Supreme Court of the State of New Hampshire, rendered October 5, 1909, in the case of the International Paper Co. vs. Town of Walpole. This decision is reported in 75 New Hampshire Reports, p. 320; also in 74 Atlantic Reporter p. 180. The Paper company filed a petition against the Town of Walpole for an abatement of taxes assessed on logs and lumber in that town on April 1, 1907. A partial abatement of these taxes was ordered by the Superior Court, and the case was carried to the New Hampshire Supreme Court, resulting in the affirmance of the decree which had been rendered by Judge Chamberlin of the Superior Court. Under the Act of the New Hampshire Legislature passed in 1901, which provides for the taxation of stock in trade, so defined so as to include raw materials and manufactures as well as logs and lumber reckoned at the average value thereof for the year, with a further provision for the taxation of logs and lumber at their full value in the town where located on April 1, it was held that logs of a pulp and paper manufacturer stored on his own land in New Hampshire for use in his manufacturing business are properly taxed as stock in trade, and that logs or lumber not proper stock in trade are taxable under the later provision of the statute.

The opinion in this case was written by Chief Justice Parsons, but one of the members of the Supreme Court at that time was the same Judge who is now the presiding

Judge of the Circuit Court of Appeals for the First Circuit. Inasmuch as he concurred in the opinion as prepared by Judge Parsons, it is plain to know what his views were [fol. 19] on this question in 1902. In the opinion of the New Hampshire Supreme Court it is set forth that many clauses of statutes, which taken separately and literally, would make some property taxable twice or thrice, are not to be taken separately or literally, but are to be understood as subjecting the property they described to single taxation only, and as designed, by their varied and comprehensive descriptions, for the purpose of protecting property from escaping single taxation. Judge Parsons further says:

"Neither would it be reasonable to conclude that by comprehensive descriptions designed to include all property of a class it was intended to leave to the election of the taxing officers, or of the owner, into which class property of a certain description should fall for taxation. Although a literal construction of one clause in the New Hampshire statute of 1901 might include all logs as stock in trade, and a like interpretation of a later clause in that statute might require the appraisal of all logs on hand April 1st at their full value, the constitutional rule of equality renders it certain that it was not intended the same property should be taxed under both sections; and the general principal of a reasonable purpose, properly taken into consideration in the interpretation of written language, renders equally certain the absence of an intent to leave such property to be taxed one way or the other, according to the interest of the owner or the whim of the assessors."

When we turn to Par. 297 of the Political Code of Porto Rico we find a provision that all personal property shall be assessed to the owner thereof in the municipality in which he resides on the 15th day of January, except that such personal property as goods, wares, merchandise and other stock in trade shall be assessed to the owner in the municipality in which it is thus situated.

After careful consideration of this question, I am clearly of the opinion that the complainant is entitled to a permanent injunction as prayed for in its bill, and an order may be prepared to that effect.

To this order and opinion counsel for the Treasurer of Porto Rico excepts.

Done and ordered in open court at San Juan, P. R., this [fol. 20] 23rd day of March, 1925.

Arthur F. Odlin, Judge.

[fol. 21] In United States District Court

Final Decree. Filed Mar. 31, 1925

This cause came on to be heard at this term upon the bill of complaint and the answer of defendant and the proofs in the case, and was argued by counsel, and the cause having been considered by the Court and an opinion filed therein on the twenty third day of March, 1925, it is hereby ordered, adjudged and decreed as follows:

1. That defendant Juan G. Gallardo, as Treasurer of Porto Rico, prior to the filing of the complaint herein assessed against complainant a property tax of $6,844.56 for the fiscal year 1923-24; that said tax was based upon an assessment of property in complainant's possession January 15th preceding said fiscal year instead of the average market value of the stock of material or merchandise during the year next preceding the time of assessment; that similar assessments for future years were threatened; and that attachment, seizure, embargo and sale of complainant's property was threatened by defendant upon failure to pay any such tax.

2. That complainant is a manufacturer, merchant and tradesman.

3. That the average market value of complainant's stock of material or merchandise during the year 1922, the year next preceding the time of assessment of property taxes for the fiscal year 1923-24, was $126,631.00 only, and on other property valued at $7,799.00, the lawful 2.24 per cent tax, amounting to $3,023.63 was duly tendered before the filing of the complaint herein and thereafter has been duly paid pursuant to stipulation of the parties; that the excess claimed by defendant as Treasurer, to wit $3,820.93, is unlawful and void.

[fol 22] 4. That on January 15, 1924, complainant had unsold in its possession in its dock and warehouse in San Juan, Porto Rico, fertilizer materials and other goods to the value of $24,302.00 in the original packages in which the same were imported for commercial purposes by complainant from foreign countries, to wit, Chili, Germany and Belgium; that said property was included in defendant's assessment for the fiscal year 1923-24.

5. That a permanent injunction issue directed to defendant Juan G. Gallardo, Treasurer of Porto Rico, restraining and enjoining him from assessing against complainant or its property any property tax for the fiscal year 1923-24 in excess of said sum of $3,073.63, which has been already paid, and from assessing against complainant for subsequent years any property tax on its stock of materials or merchandise in excess of that at the lawful rate based on the average market value of said stocks of material or merchandise during the year next preceding the time of assessment and from assessing against complainant for subsequent years any property tax upon fertilizers or other goods unsold in the hands of complainant in the original packages in which the same were imported by complainant from foreign countries.

That complainant recover of the defendant its costs of this action, to be taxed by the Clerk of the Court.

All further matters, if any, reserved.

Dated San Juan, Porto Rico, March 31, 1925.

Arthur F. Odlin, Judge of the U. S. Court for P. R.

[fol 23] In United States District Court

Petition for Appeal—Filed April 7, 1925

The above named defendant, Juan G. Gallardo, as Treasurer of Porto Rico, considering himself aggrieved by the decree made and entered on the 31st, of March, 1925, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals

for the First Circuit, for the reasons specified in the assignment of errors which is filed herewith; and prays that this appeal may be allowed, and that the transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit. Defendant further prays that the amount of the bond as this Honorable Court may consider proper for the security of the rights of the opposite party, may be fixed.

San Juan, P. R. April 3, 1925.

H. P. Coats, Attorney General of Porto Rico; R. H. Todd, Jr., J. A. Lopez Acosta, of Counsel, Attorneys for Defendant.

Copy received this 6 day of April, 1925. O. B. Fraser, Solicitor for Complainant, Santini Fertilizer Company.

[fol. 24] In United States District Court

Assignments of Error—Filed April 7, 1925

Now comes Juan G. Gallardo, as Treasurer of Porto Rico, defendant appellant, and states that in the record proceedings, and in the final decree entered in this cause, manifest error has been committed to his prejudice, to wit:

1. That the court erred in refusing to grant the motion to dismiss made by the defendant in open court, and at the close of the evidence offered by the plaintiff.

2. That the court erred in granting a perpetual injunction in the final decree in favor of plaintiff, Santini Fertilizer Company, enjoining the collection of the taxes in the whole of $6,844.36 assessed on the personal property of said plaintiff and for the year of 1923.

3. That the court erred in the construction and interpretation of Section 294 of the Political Code of Porto Rico, in holding that the personal property of complainant had to be assessed, considering as the basis the average of property during the preceding year in possession of complainant, and not the property held on the 15th of January,

according to the market value of said property during the preceding year.

4. That the court erred in the interpretation of the words "average market value" as provided in Article 294 of the Political Code of Porto Rico.

5. That the court erred in the construction and interpretation of what constitutes the stock of material or merchandise in hand of complainant in this case, according to Section 294 of the Political Code of Porto Rico.

[fol. 25] 6. The court erred in holding that the mode of assessment executed by the defendant in this case did not conform to the provisions of Article 294 of the Political Code of Porto Rico.

7. That the court erred in the construction and interpretation of Article 297 of the Political Code of Porto Rico, in holding that said articles and Section 294 of the same Code were contradictory and imposed a double taxation on the same personal property.

8. That the court erred in considering applicable to this case the decision of the Supreme Court *of the United States* of New Hampshire in the case of International Paper Co. vs. Town of Walpole, 75 N. H. Rep. 329, 74 Atl. 180.

9. That the Court erred in determining the meaning of the wording of Section 297 of the Political Code of Porto Rico, in connection with Section 294 of the same code, in holding that said Section 297 would justify the granting of a perpetual decree of injunction against defendant.

10. That the Court erred in refusing to hold that the assessment made to the plaintiff, Santini Fertilizer Company, did not comply with Section 294 of the Political Code of Porto Rico.

11. That the Court erred in holding that the assessment made by the defendant in this case on the personal property of plaintiff, as held on January 15, 1923, was illegal and unenforceable.

12. That the final decree of injunction in this case is against the manifest weight of the evidence.

13. That the final decree of injunction in this case is contrary to law.

[fol. 26] 14. For other errors appearing on the record.

Wherefore said defendant, Juan G. Gallardo, as Treasurer of Porto Rico, prays that the said decree be reversed and the District Court of the United States, for the District of Porto Rico, may be ordered to enter a decree dismissing the bill of complaint, vacating the permanent injunction issued and granting the prayer of the answer filed by defendant.

San Juan, P. R., April 3, 1925.

H. P. Coats, Attorney General of Porto Rico; R. H. Todd, Jr., J. A. Lopez Acosta, of Counsel, Attorneys for Defendant appellant.

Copy received this 6 day of April, ——— O. B. Frazer, Solicitor for Complainant, Santini Fertilizer Co.

[fols. 27-32] In United States District Court

Order Allowing Appeal—Filed April 7, 1925

The defendant, Juan G. Gallardo, having petitioned this Court that an appeal be allowed to the Circuit Court of Appeals for the First Circuit from the final decree herein entered and filed on the 31st day of March, 1925 against said defendant;

The Court allows the appeal prayed for and fixes the bond at $200, or a cash deposit with the Clerk of this court for said amount, as security to respond for the costs of the plaintiff appellee in the event of the appellant failing to prosecute the appeal to effect.

San Juan, P. R., April 7th, 1925.

Arthur F. Odlin, Judge United States District Court.

[fol. 33] In United States District Court

Statement of Evidence—Filed April 22nd, 1925

Caption

This cause came on for hearing before the Hon. Arthur F. Odlin, Judge of the District Court of the United States for Porto Rico, sitting at San Juan, Porto Rico, on the ninth day of January, nineteen hundred and twenty five.

Nelson Gammans, Esq., counsel for the complainant.
Hon. H. P. Coats, Attorney General of Porto Rico, counsel for the defendant.
Hon. J. A. Lopez Acosta, of counsel.

[fol. 34] Whereupon Victor Braeggar, being called as a witness for the complainant, having been duly sworn, testified as follows:

Direct examination by Mr. Gammans:

My name is Victor Braeggar. I am at present General Agent of the Maryland Casualty Company and the Jefferson Standard Life Insurance Company, but I was formerly the office manager and auditor of the Santini Fertilizer Company, the complainant herein. While I was in the employ of the said Company, I had general oversight of the books, although I had, of course, a bookkeeper to do detail work.

The principal business of the Santini Fertilizer Company was the sale of fertilizer material, mixed and raw. It was customary for the Company to carry a larger stock on January 15th than at any other time of the year, and this was necessary from a practical business point of view, because the planting season for tobacco begins in November, and that of sugar cane in January and February, so that a sufficient amount of raw material to take care of the heavy demands during the early part of the year must be on hand.

The assessment of the stock of goods on hand, amounting to $296,761, does not in my opinion, represent the average market value of the stock in trade during the year

preceding January 15, 1923. I should say that this average is between $150,000 and $160,000, and during the year 1922, it was around $130,000.

I have calculated the exact figures, by taking the sum total by monthly inventories, and dividing by twenty four, [fol. 35] deducting one eleventh to take off the additional ten per cent added to all goods for insurance purposes. The exact average for the year 1922, excluding insurance, was approximately $126,000. I have read the complaint filed herein, and find that the exact amount was $126,631.

I consider the method described above, for calculating the average during the year preceding January 15, 1923, the only method upon which taxes should be based. I obtained *by* figures from the insurance reports, made to the Insurance Department of the Armour Fertilizer Works, and these reports are absolutely correct, although they include an additional ten per cent.

On January 15, 1923, and included in the property assessed by the Treasurer, there was property on the dock or in the warehouse of the Santini Fertilizer Co. in San Juan in the original packages in which the same had been imported by the Santini Fertilizer Co. from foreign countries. This property consisted of precipitated bone meal, sulphate of potash, muriate of potash and nitrate of soda, but I cannot recollect the respective values of these items without consulting my memorandum.

According to this memorandum, there were on hand 122 tons of nitrate of soda, net cost $6,710; 146 tons of sulphate of potash, $7,154; 189 tons of muriate of potash, $7,182, and 74 tons of precipitated bone mean $3,256. Here I see included cotton seed meal in error. That is always imported from the United States. There was on hand 31 tons of it, value $1,829. The proper amount is the total in the complaint, $126,000 odd dollars, minus $1,829.

[fol. 36] The nitrate of soda was imported from Chili, the sulphate of potash and muriate of potash from Germany, and the precipitated bone meal from Belgium.

These goods were imported for sale as raw materials or mixed with other ingredients for the compounding of fertilizers. The Company does not use any fertilizer, but sells it all.

I could not say definitely whether or not these different kinds of goods from foreign countries, which were on the dock or in the warehouse, had been sold on January 15, 1923, but of course there is always a certain amount that is spoken for and booked for future delivery, although they may be held in stock on contracts unfinished. No specific bags are set aside for specific contracts. None of these bags had been opened. The amount shown in the insurance report as of January 15th, or the middle of the month, comprised only goods that were still in the original bags, either at the dock or at the plant.

The Santini Fertilizer Company is engaged in the mercantile business, as merchants and manufacturers of mixed fertilizer and raw materials. I should say that the embargoing of the office furniture and fixtures of the Santini Fertilizer Company would seriously interrupt their business. Their calculated sales per week are about $40,000. An embargo of any of their merchandise would affect their business, because raw materials can only be imported subject to obtaining proper freight connections, and a delay often holds back a shipment awaiting steamer, and cannot be procured very easily locally.

[fol. 37] Cross-examination by Mr. Acosta:

Q. You stated that the amount of $296,761 was not for the value of the merchandise according to the value of the preceding year. How do you know that?

A. It could not have been the average value—by adding up the twenty-four bi-monthly inventories.

Q. Wait a minute—I am not asking the system you used. You stated in your testimony that this amount could not be the average value of the merchandise, taking as a basis an average business and the goods during the preceding year. How do you know that?

A. Because at no time would the Fertilizer Company have carried almost $300,00 worth of goods all through the year; sometimes it may have reached $300,000 or $400,000.

Q. I am speaking of the merchandise, the average value throughout the year?

A. That was $125,000, as I recollect.

I reached this conclusion by adding up the twenty four bi-monthly inventory reports. I take as a basis for the

average, the amount of goods on hand in the warehouse during those twelve months. The average value during the year works out the same way. It is bound to. But the average price value of the goods during the preceding year would not be the exact value on January 15th. It just happens that during the month of January the chances are that the value of raw material will be the lowest in a year's history, because at that time all the steel mills are heavily operating, and there is a lot of sulphate of a monia being [fol. 38] produced, which brings down the cost of material. By averaging up you get a fair price. I average both the amount of the goods and the corresponding class value for each class during the whole year.

$296,761 was the actual amount of goods on hand on January 15th, but the average through out the year has been or would have been $126,000. The $296,761 represents the cost of all goods on hand on January 15th, regardless of what the value might have been previously.

Mr. Gammans stated that the complainant was willing to admit or concede that the amount of $296,880 is the amount of goods on hand on January 15, 1923, and that the prices at which they were inventoried in making up that figure are the same as the average price per unit during the preceding year. He later conceded that the basis was not the price per unit, but the market price during the preceding year.

Mr. Bragger was enable to say, without referring to the records, whether the foreign goods on hand on January 15, 1923, —nitrate of soda, sulphate of potash, muriate of potashes precipitated bone meal, etc.— were on the dock or in the factory, and these records were not in Court.

Q. Tell me, Mr. Witness, these raw materials and merchandise you spoke of you say that some of them were already spoken for for future delivery?

A. Yes, sir.

Q. Then who was the owner of this merchandise?

A. The Santini Fertilizer Company

Q. On January 15th, 1923?

A. Yes, sir.

[fol. 39] Q. If anybody had come to buy some of those goods, could you deliver them?

A. Yes, sir.

Q. You could?

A. Yes, sir, but the moment they are taken out of the stock they are billed and no longer remain the property of the Santini Fertilizer Company.

Q. Therefore, in your trade, you could dispose of any of those goods you had on hand?

A. Depending upon the demand.

Q. Supposing you got a contract or somebody came in to buy as much as you had in your warehouse, could you sell it?

A. Not for immediate delivery.

Q. Why not?

A. Because no farmer used all the fertilizer he can consume at any one time.

Q. But supposing they wanted to, could you sell it?

A. Sure, if we had it.

Q. When you sell this merchandise, do you transfer it from the package or transfer them to bags?

A. If they are sold as raw material and the original containers are in good condition, they are sold as it is, but if they have to be sold to form part of a mixture, they are divided, that is, taken out of the containers, and mixed up.

Q. Therefore, the only condition under which you change the containers or the packages is if it is bad, in bad condition?

A. Yes, sir.

Q. And if it is in good condition you sell it in the package in which it came?

A. Yes, sir.

[fol. 40] Q. Anybody else have any title to the ownership of this personal property that you know of?

A. Nobody.

Mr. Bragger testified further as follows:

The tax the company had to pay was roughly 2.34% on the Department claim of $296,000, which amounted to about $6,920. I think that the company could pay this amount of money without going into bankruptcy, and that, if the Treasurer or the Treasury Department collected this sum it could be paid without any great injury to the firm's commercial standing.

Redirect examination by Mr. Gammans:

Mr. Bragger testified as follows:

The factory of the Santini Fertilizer Company is located on Pier No. 6, San Juan, and the warehouse which I have mentioned forms part of the factory.

The complainant then closed, and the witness withdrew.

As a matter of record, Mr. Acosta made a motion to dismiss the petition, because the evidence offered by the plaintiff was insufficient to prove the facts in his case and to justify a judgment in favor thereof.

The Court: The plaintiff has not rested yet.

Mr. Gammans: Yes, sir, I rested, your Honor.

The Court: During the argument on the above motion, Mr. Gammans restated in a new form his admission given before in the record, as follows: "That the $296,800 odd dollars is obtained by taking the quantity of goods on hand [fol. 41] on Jan. 15, 1923, at the average price of similar goods during the year next preceding.

(The Court then directed an order which is of record, and the hearing terminated until further order of the Court.)

(Continuation of Hearing on January 28, 1925)

Mr. Acosta: I would like to offer as evidence a certified copy of the return filed by the Santini Fertilizer Company for the year 1922-24.

The Court: That may be marked as an exhibit.

(Marked Exhibit "A" for the defendant.)

Mr. Acosta: I also offer a copy of a letter written by Mr. Juan Silva Negron, General Appraiser in the Insular Government, showing the amount of merchandise, cash, etc., on the books of the Santini Fertilizer Company as of January 15, 1923.

Mr. Gammans: We have no objection to that as long as it clearly appears in the record that the properties described in the letter were the properties actually on hand on January 15, 1923, and did not represent an average during the year.

The Court: Let it be marked with that understanding.

(Marked Exhibit "B" for the defendant.)

[fol. 42] Whereupon JUAN SILVA NEGRON, being then called as a witness for the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Lopez Acosta:

My name is Juan Silva Negron, and my occupation is that of Assessor at Large. I assess merchandise in San Juan.

In accordance with section 294 of the Political Code of Porto Rico, I assess merchandise by using the inventory of the merchandise on hand on January 15th, and then assessing it according to the average value of the previous year.

I went to the office of the Santini Fertilizer Company in connection with this case, and I wrote the letter which has been filed as evidence.

In ascertaining the value of the merchandise on hand, I considered that the value of the merchandise on January 15th was the same value as the preceding year, on account of the result obtained with other merchandise that I assessed.

Cross examination by Mr. Gammans:

Q. When you made that examination of the books of the Santini Fertilizer Company did you look up in the books the amount of merchandise that was on hand at different periods during the year preceding that January 15th?

A. No, sir.

Q. When you speak of the average value, do you refer to the average value of the entire stock taken as a whole?

A. The average value per unit.

[fol. 43] Q. So that substantially what you did was to take the number of units on hand January 15, 1923, and multiply it by the average price per unit, the average price being based on the average price per unit during the preceding year?

A. Yes, sir.

Q. Is that the system which has been followed by the office of the assessor?

A. Yes, sir, that is the system. Of course in some cases, all these merchants that don't keep books, we used to do it in some other way, but merchandise like the Santini Fertilizer Company and some others we used to do that way.

At present, this method is not followed in all cases, because, for example, when a merchant gave his inventory, and gave his price, and we agreed, we studied the matter by the inventory according to the price they fixed, but when there is no claim we used to proceed according to which the law says. We never took the average of the merchandise during the year, but the stock of merchandise on hand on January 15th, and then we assessed it according to the average value. This plan is the one now in effect.

The assessors have never used the system of writing the assessment where the average amount of goods during the preceding year was lower than the amount on hand on January 15th. If the amount is lower than the preceding year, we do not take note of it, but of the one on January 15th, and I know of no case where the Treasury Depart- [fol. 44] ment has ever increased the assessment over the value of the goods on January 15th, upon the ground that the average amount of goods for the preceding year was very much lower (greater?).

I am not familiar with the assessment of the Texas Company of Porto Rico during last year, because it is a corporation, and my work with relation to corporations is when the assessor of corporations requests me to do same.

Mr. Acosta: I would like to offer as evidence the declaration given here the other day by Mr. Bragger, as part of my evidence.

The Court: It will be so considered.

Mr. Acosta: In order to prove the merchandise he proved was in the warehouse, was in his control and could be sold at any time.

The Court: The cause is submitted and counsel are allowed until February 4th to submit written arguments.

The End

Stipulation re Statement of Evidence

It is hereby stipulated and agreed by and between the parties hereto, that the foregoing is a true and correct statement of the evidence, and it is agreed that either party may obtain the approval of the Judge to the foregoing statement of evidence ex parte in the form appearing below.

San Juan, Porto Rico, April —, 1925.

[fol. 45] H. P. Coats, Attorney General of Porto Rico; p. R. H. Todd, Jr., Asst. Attorney General of P. R.; J. A. Lopez Acosta, of Counsel, Attorneys for Defendant Appellant. Nelson Gammans, O. B. Frazer, Attorneys for Complainant-Appellee.

Judge's Certificate to Statement of Evidence

The foregoing statement is approved in accordance with Rule 75 of Equity Rules of 1912, as true, complete and properly prepared, and it is ordered that said statement be filed in the Clerk's office and become a part of the record for all purposes of the appeal herein.

San Juan, April 24, 1925.

Arthur F. Odlin, Judge of the United States District Court for Porto Rico.

[fol. 46] In United States District Court

Exhibit in Evidence

Government of Porto Rico, Department of Finance, Bureau of Property Taxes

No. 9

Please quote the above number in any further correspondence on this subject.

Address all official communications to the Treasurer of Porto Rico, San Juan.

I, Juan G. Gallardo, Treasurer of Porto Rico, hereby certify that the following is a true translation of a letter signed by Juan Silva Negrón, Assessor at Large, and ad

dressed to the Treasurer of Porto Rico as of June 11, 1923, the original of which appears attached to the assessment sheets of the Corporation Santini Fertilizer Co. for the fiscal year 1923 24:

"San Juan, P. R., June 11, 1923.

Hon. Treasurer of Porto Rico, San Juan, P. R.

Sir: I have the honor to inform you that I have on this date called at the offices of the corporation Santini Fertilizer Co., and from an examination of their books I have obtained the following results as regards their merchandise in stock, cash, etc. on January 15th of the current year:

Merchandise	$296,761 00
Furniture	3,709 16
Automobiles	2,138 92
Cash:	
With Royal Bank	2,721 38
With Nova Scotia	34 70
On hand	200 00
Total	$305,365 16

The foregoing is reported for purposes of taxation of said corporation for the fiscal year 1923 24.

Respectfully, (Signed) Juan Silva Negrón, Assessor at Large."

Given under my hand and seal of the Department of Finance this the 23rd day of May, 1925, at San Juan, Porto Rico.

Juan G. Gallardo, Treasurer of Porto Rico.

A correct translation. Luis A. Castro, official translator U. S. District Court for P. R.

(Here follow exhibits marked side folio pages 47, 47a, 48, 48a, 49, and 49a)

EXHIBIT IN EVIDENCE

IN

321

GOBIERNO DE PUERTO RICO

DEPARTAMENTO DE HACIENDA

NEGOCIADO DE CONTRIBUCIONES SOBRE LA PROPIEDAD

PLANILLA DE CORPORACIÓN

CORPORATION SCHEDULE

3 4

A LOS EFECTOS DE IMPOSICIÓN DE CONTRIBUCIONES PARA EL AÑO ECONÓMICO 1925-1926

FOR LEVYING OF TAXES FOR FISCAL YEAR 1925-1926

Nombre de la corporación (Name of corporation) SANTINI FERTILIZER COMPANY

Incorporada en (Place of incorporation) SAN JUAN PORTO RICO

Clase del negocio al que se dedica (Business in which engaged) MANUFACTURE OF (Trade) FERTILIZER

Punto principal del negocio en Puerto Rico (Principal place of business) PORTO RICO (SAN JUAN)

Nombre y dirección de los directores si la corporación fuere doméstica, o nombre y dirección del agente en Puerto Rico si se tratare de una sociedad incorporada fuera de Puerto Rico (Name and address of the directors, if it is a domestic corporation, or name and address of its agent in Porto Rico if it is incorporated outside of Porto Rico) NICOLAS M. SANTINI JR.

CAPITAL EN ACCIONES

CAPITAL STOCK

Clase (Class) Common

Número de acciones emitidas (Number of shares issued) 250

Valor a la par de cada acción $ (Par value of each share) 100

Importe del capital autorizado $ (Amount authorized) 25000

Suma pagada por las acciones emitidas $ (Amount paid in on shares) 25000

Valor en el mercado de cada acción $ (Market value of each) 100

Clase (Class)

Número de acciones emitidas (Number of shares issued)

Valor a la par de cada acción $ (Par value of each share)

Importe del capital autorizado $ (Amount authorized)

Suma pagada por las acciones emitidas $ (Amount paid in on shares)

Valor en el mercado de cada acción $ (Market value of each)

Clase (Class)

Número de acciones emitidas (Number of shares issued)

Valor a la par de cada acción $ (Par value of each share)

Importe del capital autorizado $ (Amount authorized)

Suma pagada por las acciones emitidas $ (Amount paid in on shares)

Valor en el mercado de cada acción $ (Market value of each)

BONOS

BONDS

Clase (Class)

Número de los emitidos (Number issued)

Fecha de la emisión (Date of issue)

Término (Term) años. (years)

Tipo de interés (Rate of interest) %

Valor a la par de cada bono $ (Par value of each)

Valor en el mercado de cada bono $ (Market value of each)

¿Qué omisión, si hubo alguna, ha habido en el pago de los intereses de los bonos? (What default, if any, has been made in the payment of interest on bonds?)

Clase (Class)

Número de los emitidos (Number issued)

Fecha de la emisión (Date of issue)

Término (Term) años. (years)

Tipo de interés (Rate of interest) %

Valor a la par de cada bono $ (Par value of each)

Valor en el mercado de cada bono $ (Market value of each)

¿Qué omisión, si hubo alguna, ha habido en el pago de los intereses de los bonos? (What default, if any, has been made in the payment of interest on bonds?)

Clase (Class)

Número de los emitidos (Number issued)

Fecha de la emisión (Date of issue)

Término (Term) años. (years)

Tipo de interés (Rate of interest) %

Valor a la par de cada bono $ (Par value of each)

Valor en el mercado de cada bono $ (Market value of each)

¿Qué omisión, si hubo alguna, ha habido en el pago de los intereses de los bonos? (What default, if any, has been made in the payment of interest on bonds?)

This is to CERTIFY that the foregoing documents bearing the official seal of this Department, are a true and exact copy of the assessment sheet and its exhibit #3 filed by the corporation Santini Fertilizer Company for purposes of taxation on their property for the fiscal year 1923-24, as appearing in volum 7 of the assessment sheets for said year.

San Juan, Porto Rico, January 9, 1925.

Tesorero de Puerto Rico.

Ganancia bruta durante el último año de negocios $ 735494.80
Gross earning during last business year

Gastos durante el último año de negocios $ 703329.22
Expenses during last business year

Ganancia neta durante el último año de negocios $ 32165.58
Net earnings during last business year

Tanto por ciento de dividendo pagado durante el último año de negocios
Rate of dividend paid during last business year

Clase de acciones _____ _____ %
Class of shares

Clase de acciones _____ _____ %
Class of shares

Clase de acciones _____ _____ %
Class of shares

Importe de lo pagado como dividendo durante el último año de negocios $ _____
Total amount of dividends paid during last business year

TE[illegible]DORES DE LOS BONOS

BONDHOLDERS

NOMBRE NAME	DIRECCIÓN ADDRESS	NÚMERO DE BONOS NUMBER HELD	VALOR A LA PAR PAR VALUE

This is to CERTIFY that the foregoing documents bearing the official seal of this Department, are a true and exact copy of the assessment sheet and its exhibit #3 filed by the corporation Santini Fertilizer Company for purposes of taxation on their property for the fiscal year 1923-24, as appearing in volum 7 of the assessment sheets for said year.

San Juan, Porto Rico, January 9, 1925.

Tesorero de Puerto Rico.

Ganancia bruta durante el último año de negocios $ 735494.90

MUNICIPIO DE MUNICIPALITY OF		NÚMERO NUMBER	VALORACIÓN—Valuation		
			Corporación Corporation	Tasador Assessor	
Mercaderías	Merchandise				
Mobiliario	Furniture				
Bueyes	Oxen				
Vacas	Cows				
Otro ganado vacuno	Other cattle				
Ganado caballar	Horses and mares				
Id. mular	Mules				
Otros animales	Other animals				
Automóviles, Licencias No.	Automobiles, Licenses No.				
Camiones, Licencias No.	Trucks, Licenses No.				
Carretas	Ox-carts				
Otros vehículos	Other vehicles				
Embarcaciones	Vessels				
Maquinaria mueble	Movable machinery				
Vía portátil, kilómetros	Portable track, kilometers				
Materiales de construcción	Construction materials				
Implementos agrícolas	Agricultural implements				
Herramientas y útiles	Tools				
Otros bienes muebles	Other personal property				
	TOTAL,				

TOTAL EN PUERTO RICO

Mercaderías	Merchandise				
Mobiliario	Furniture				
Bueyes	Oxen				
Vacas	Cows				
Otro ganado vacuno	Other cattle				
Ganado caballar	Horses and mares				
Id. mular	Mules				
Otros animales	Other animals				
Automóviles, Licencias No.	Automobiles, Licenses No.				
Camiones, Licencias No.	Trucks, Licenses No.				
Carretas	Ox-carts				
Otros vehículos	Other vehicles				
Embarcaciones	Vessels				
Maquinaria mueble	Movable machinery				
Vía portátil, kilómetros	Portable track, kilometers				
Materiales de construcción	Construction materials				
Implementos agrícolas	Agricultural implements				
Herramientas y útiles	Tools				
Otros bienes muebles	Other personal property				
	TOTAL,				

NOTA:

....., 192....

Mercaderías	Merchandise		126631.	296760	
Mobiliario	Furniture & Autos		3667.16	5850	
Bueyes	Oxen				
Vacas	Cows				
Otro ganado vacuno	Other cattle				
Ganado caballar	Horses and mares				
Id. mular	Mules				
Otros animales	Other animals 4427				
Automóviles, Licencias No.	Automobiles, Licenses No. 4432	3			
Camiones, Licencias No.	Trucks, Licenses No. 3962				
Carretas	Ox-carts				
Otros vehículos	Other vehicles				
Embarcaciones	Vessels				
Maquinaria mueble	Movable machinery				
Vía portátil, kilómetros	Portable track, kilometers				
Materiales de construcción	Construction materials				
Implementos agrícolas	Agricultural implements				
Herramientas y útiles	Tools				
Otros bienes muebles	Other personal property				
	TOTAL,		130298.16	302610	

MUNICIPIO DE
MUNICIPALITY OF

Mercaderías	Merchandise				
Mobiliario	Furniture				
Bueyes	Oxen				
Vacas	Cows				
Otro ganado vacuno	Other cattle				
Ganado caballar	Horses and mares				
Id. mular	Mules				
Otros animales	Other animals				
Automóviles, Licencias No.	Automobiles, Licenses No.				
Camiones, Licencias No.	Trucks, Licenses No.				
Carretas	Ox-carts				
Otros vehículos	Other vehicles				
Embarcaciones	Vessels				
Maquinaria mueble	Movable machinery				
Vía portátil, kilómetros	Portable track, kilometers				
Materiales de construcción	Construction materials				
Implementos agrícolas	Agricultural implements				
Herramientas y útiles	Tools				
Otros bienes muebles	Other personal property				
	TOTAL,				

(ALAVUELTA)

F. Form No. 9 D.—B. R. 1089
D. R. 40—Dec. 9, 1923—1,500. 3 4

GOBIERNO DE PUERTO RICO

DEPARTAMENTO DE HACIENDA

NEGOCIADO DE CONTRIBUCIONES SOBRE LA PROPIEDAD

Año económico 1925-26.
Fiscal Year.

Anexo No. 3.
Exhibit No.

Bienes Muebles Tangibles propiedad de Santini Fertilizer Co.

Tangible personal property owned by

MUNICIPIO DE San Juan
MUNICIPALITY OF

		NÚMERO NUMBER	VALORACIÓN—Valuation: Corporación Corporation	VALORACIÓN—Valuation: Tasador Asesor	
Mercaderías	Merchandise		126631.	296760	
Mobiliario	Furniture & Autos		3667.16	5850	
Bueyes	Oxen				
Vacas	Cows				
Otro ganado vacuno	Other cattle				
Ganado caballar	Horses and mares				
Id. mular	Mules				
Otros animales	Other animals 4427				
Automóviles, Licencias No.	Automobiles, Licenses No. 4432	3			
Camiones, Licencias No.	Trucks, Licenses No. 3962				
Carretas	Ox-carts				
Otros vehículos	Other vehicles				
Embarcaciones	Vessels				
Maquinaria mueble	Movable machinery				
Vía portátil, kilómetros	Portable track, kilometers				
Materiales de construcción	Construction materials				
Implementos agrícolas	Agricultural implements				
Herramientas y útiles	Tools				
Otros bienes muebles	Other personal property				
	TOTAL.		130298.16	302610	

MUNICIPIO DE
MUNICIPALITY OF

Mercaderías	Merchandise				
Mobiliario	Furniture				
Bueyes	Oxen				
Vacas	Cows				
Otro ganado vacuno	Other cattle				
Ganado caballar	Horses and mares				
Id. mular	Mules				
Otros animales	Other animals				
Automóviles, Licencias No.	Automobiles, Licenses No.				
Camiones, Licencias No.	Trucks, Licenses No.				

CAPITAL
CAPITAL

PARA LAS INCORPORADAS EN PUERTO RICO
For Domestic Corporations
VALOR EN EL MERCADO DE
MARKET VALUE OF

	VALORACION—Valuation		
	Por la corporación By the corporation	Por el tasador By the assessor	
250 acciones clase common a razón de $ 100 una (Shares class / At / each)	25000		
____ acciones clase ____ a razón de $ ____ una			
____ acciones clase ____ a razón de $ ____ una			
____ bonos clase ____ a razón de $ ____ uno (Bonds class / At / each)			
____ bonos clase ____ a razón de $ ____ uno			
____ bonos clase ____ a razón de $ ____ uno			
Sobrante y fondo de amortización (Surplus and sinking funds)	32987.63		
Ganancias no divididas (Undivided earnings)	14384.99		
Cualquiera otra clase de deuda, etc. (All other class of liabilities)	888031.27		
TOTAL (PASIVO DE LA COMPAÑIA / LIABILITIES)	960403.89		

PARA LAS INCORPORADAS FUERA DE PUERTO RICO
For Foreign Corporations

Valor total del capital empleado en Puerto Rico (Total value of capital employed in Porto Rico)			

PROPIEDAD EN PUERTO RICO
PROPERTY IN PORTO RICO

Inmueble
Real

Fincas urbanas y rústicas (Rural and urban real state)	(Anexo No. 1) (Exhibit)			
Correspondiente a ferrocarriles (Railroad real property)	(Anexo No. 2) (Exhibit)			
Factorías o fábricas de azúcar (Sugar factory)	(Anexo No. 5) (Exhibit)			
Cualquier otra clase de factoría (Other factory)	(Anexo No. 6) (Exhibit)			
Plantas eléctricas, línea, etc. (Electric plants and lines)	(Anexo No. 7) (Exhibit)			
Telégrafos y teléfonos (Telegraphs and telephones)	(Anexo No. 8) (Exhibit)			
TOTAL				

Mueble
Personal

Efectivo en caja o depositado en bancos (Cash on hand or on deposit)	2956.08	1896.95	2950
Bonos de la Libertad o de otra clase emitidos por el Gobierno de los E. E. U. U o de Pto. Rico en cualquiera de sus ramas (Liberty or any other kind of bonds issued either by the United States Government or the Insular Government of Porto Rico, or any of the subdivisions there of)			
Bonos y acciones de corporaciones domésticas (Bonds and shares of domestic corporations)			
Bonos y acciones de sociedades incorporadas fuera de Pto. Rico (Bonds and shares of foreign corporations)			
Créditos con garantías de hipotecas (Mortgages owned)			
Sigue a la vuelta—*Carried forward*	1896.95	2950	

Bienes muebles *Viene de la vuelta—Brought forward* (Personal property)	1896.95	2950	
Bonos, acciones y certificados de créditos en compañías no incorporadas (Bonds, stocks, and certificates in unincorporated syndicates)			
Dinero adelantado o prestado a colonos (Money loaned or advanced to *colonos*)	155000.47		
Notas a cobrar y otros créditos no detallados antes (Notes receivable or other credits owned)	672569.43		
Franquicias y concesiones, su naturaleza y valor (Franchises and concessions owned, their nature and value)			
Material rodado de ferrocarriles (Anexo No. 4) (Rolling stock / Exhibit)			
Productos de la industria no vendidos (Industrial products unsold)			
F. & F. and Autos	3667.16		
Materias primas para la industria actual average (Raw material for industrial purposes)	126631.	302610	
Toda otra clase de bienes tangibles (Anexo No. 3) (Tangible personal property / Exhibit)			
Cualquier otra clase de bienes muebles no especificados (Other personal property)			
Deferred charges	638.88		
TOTAL MUEBLES (Total personal)		305560	
TOTAL bienes inmuebles y muebles (ACTIVO DE LA CORPORACIÓN / ASSETS OF THE CORPORATION) (Total real and personal property)	960403.89	305560	

A CORRECT TRANSLATION

JURAMENTO
OATH

Yo, Nicolas M. Santini Jr. Vice President
[Nombre—Name] [Título oficial—official title]

de San Juan, debidamente juramentado, digo que, según mi leal saber y entender
of being duly sworn say that to the best of my knowledge

la declaración que precede y la de los anexos ~~marcados~~ 1 (que se hacen una parte de esta declaración tan
information and belief the foregoing statement and those in the attached exhibits Nos ~~marked~~ 1 (which are made a part

ampliamente como si en realidad fuesen una parte de ella) contienen una relación cabal, verdadera y completa de todos los
hereof as fully as though a physical part of the statement set forth on the sheet) contain a full, true and complete list of all property held

bienes que tiene o posee la antedicha Santini Fertilizer Company
by or belonging to the aforesaid

en la Isla de Puerto Rico, en 15 de enero de 1925; que toda la expresada propiedad ha sido descrita completa y equitativa-
in the Island of Porto Rico on the fifteenth day of January 1925; that all such property has been fully

mente y se ha manifestado su verdadero estado y valor; que todas las preguntas hechas con respecto a dicha propiedad han
and fairly described and its true condition and value represented; that all interrogatories relating the same have

sido contestadas del todo diciendo la verdad; y que no he procurado en ningún caso, inducir en error respecto a la cantidad y
been fully and truthfully answered and that I have in no case sought to mislead as to the quantity or

calidad de dichos bienes.
quality of said property.

SANTINI FERTILIZER CO.
N. M. Santini Jr.
[Título oficial—official title]

Suscrita y jurada ante mí, hoy 20th de March de 1923.
Subscribed and sworn before me this day of

No. 326 (Hay un sello de 25 cts) Jaime Sifre Jr.
Notario Público—Notary Public

Todo cuanto aquí se consigne deberá referirse al día **15 de enero, 1925.** Es indispensable que absolutamente todo
All the above information shall be given as of January 15, 1925. It is absolutely necessary that all

dato que la presente requiere sea consignado, aun cuando en algunos proceda hacerlo en forma negativa. No será admitida
information asked herewith be answered in full, even when you have to answer as to some of the questions. No statement leaving

ninguna declaración en la que aparezcan algunos datos sin consignar.
any question unanswered shall be accepted by the Department.

OFFICIAL TRANSLATION
US DISTRICT COURT PR

A CORRECT TRANSLATION

	VALORACIÓN—VALUATION		
	Por la corporación By the corporation	Por el tasador By the assessor	
Bienes muebles Personal property — *Viene de la vuelta—Brought forward*	1896.95	2950	
Bonos, acciones y certificados de créditos en compañías no incorporadas — Bonds, stocks, and certificates in unincorporated syndicates			
Dinero adelantado o prestado a colonos — Money loaned or advanced to *colonos*	155000.47		
Notas a cobrar y otros créditos no detallados antes — Notes receivable or other credits owned	672569.43		
Franquicias y concesiones, su naturaleza y valor — Franchises and concessions owned, their nature and value			
Material rodado de ferrocarriles (Anexo No. 4) — Rolling stock, Exhibit			
Productos de la industria no vendidos — Industrial products unsold			
F. & F. and Autos	3667.16		
Materias primas para la industria — Raw material for industrial purposes — actual average	126631.	302610	
Toda otra clase de bienes tangibles (Anexo No. 3) — Tangible personal property, Exhibit			
Cualquier otra clase de bienes muebles no especificados — Other personal property			
Deferred charges	638.88		
TOTAL MUEBLES — Total personal		305560	
TOTAL bienes inmuebles y muebles (ACTIVO DE LA CORPORACIÓN — ASSETS OF THE CORPORATION) — Total real and personal property	960403.89	305560	

A CORRECT TRANSLATION
SPECIAL TRANSLATOR
US DISTRICT COURT PR

JURAMENTO
OATH

Yo, Nicolas M. Santini Jr. — Vice President
[Nombre—Name] — [Título oficial—official title]

de San Juan, debidamente juramentado, digo que, según mi leal saber y entender
of — being duly sworn, say that to the best of my knowledge

la declaración que precede y la de los anexos ~~XXXXXX~~ 1 (que se hacen una parte de esta declaración tan
information and belief the foregoing statement and those in the attached exhibits Nos ~~XXXX~~ 1 (which are made a part

ampliamente como si en realidad fuesen una parte de ella) contienen una relación cabal, verdadera y completa de todos los
hereof as fully as though a physical part of the statement set forth on the sheet) contain a full, true and complete list of all property held

bienes que tiene o posee la antedicha Santini Fertilizer Company
by or belonging to the aforesaid

en la Isla de Puerto Rico, en 15 de enero de 1925; que toda la expresada propiedad ha sido descrita completa y equitativa-
in the Island of Porto Rico, on the fifteenth day of January 1925; that all such property has been fully

mente y se ha manifestado su verdadero estado y valor; que todas las preguntas hechas con respecto a dicha propiedad han
and fairly described and its true condition and value represented; that all interrogatories relating the reto have

sido contestadas del todo diciendo la verdad; y que no he procurado en ningún caso, inducir en error respecto a la cantidad y
been fully and truthfully answered and that I have in no case sought to mislead as to the quantity or

calidad de dichos bienes.
quality of said property.

SANTINI FERTILIZER CO.

[fol. 50] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed April 27, 1925

To the Clerk of the District Court of the United States for Porto Rico:

SIR: You are requested to make a transcript of the record herein to be filed in the United States Circuit Court of Appeals for the First Circuit, pursuant to the Appeal taken in the above entitled case and to include in such transcript of record the following papers, to wit:

1. Bill of complaint.
2. Answer.
3. Rule to Show cause.
4. Motion extending time to file statement of evidence.
5. Order granting extension of time.
6. Statement of Evidence on final hearing with exhibits attached.
7. Order and opinion of March 23rd, 1925, granting permanent injunction and writ of injunction of March 31st, 1925.
8. Petition for Appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Bond on Appeal.
12. Citation on appeal.
13. This Præcipe.

Respectfully yours, H. P. Coats, Attorney General, p. R. H. Todd, Jr., of Counsel; J. A. Lopez Acosta, Attorneys for Defendant, Appellant.

Notified and copy received this day 27 of April, 1925. O. B. Frazer, Attorney for Complainant, Appellee.

[fol. 51] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico do hereby certify that the

foregoing pages No. 1 to 50, inc., is a true and correct copy of the transcript of the record of papers and entries on file and of record in my office in the case of the Santini Fertilizer Co. vs. Juan G. Gallardo, Treasurer of Porto Rico, No. 1266 Equity, as called for by the praecipe filed by the Appellant, a copy of which praecipe is hereto attached and made a part hereof.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at San Juan, in said District, this 25th day of May, A. D. 1925, and in the 149th year of the Independence of the United States of America.

Antonio Aguayo, Clerk U. S. Dist. Court for P. R.
(Seal United States District Court for the District of Porto Rico.)

[fol. 52] In United States Circuit Court of Appeals for the First Circuit, October Term, 1926

No. 1862

Juan G. Gallardo, Treasurer, Defendant, Appellant,

v.

Santini Fertilizer Company, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Porto Rico

Before Bingham, Johnson, and Anderson, JJ.

Opinion on Rehearing—December 18, 1926

Bingham, J.:

This is a bill in equity brought by the Santini Fertilizer Company against Juan G. Gallardo, Treasurer of Porto Rico in which, among other things, it seeks to restrain him from collecting a tax assessed against the plaintiff for the year 1923-1924, and from assessing and collecting from it for the fiscal year 1924-1925 and subsequent years a property tax upon goods in its hands in the original packages in which the same was imported by it from foreign countries.

In the bill it is alleged that the plaintiff for several years has been engaged in the business of importing goods from foreign countries; that on January 15, 1923, it had on hand in its warehouse in the city of San Juan merchandise in the original bags in which the same had been imported from Germany and France by it, the aggregate value of which [fol. 53] was $26,131, and upon which the defendant assessed a tax; that on January 15, 1924, it had on hand in its warehouse merchandise in the original packages, likewise held and imported by it from foreign countries, which the defendant threatens to tax; and that said acts done and threatened to be done are illegal and without warrant of law; for Sections 294, 295 and 297 of the Political Code of Porto Rico, under which the defendant purports to take the action and make the alleged threats, as construed by the tax officials of Porto Rico, impose a tax upon merchandise so imported and held by the importer in violation of the Constitution of the United States.

There was no allegation of diverse citizenship, and diverse citizenship does not exist. The jurisdiction of the District Court was invoked solely upon the ground that the controversy involved the construction or application of the Federal Constitution. The decree appealed from was entered March 21, 1925, and the appeal to this court was allowed April 7, 1925. Section 238 of the Judicial Code, as in force at the date of the appeal, provided for appeals directly from the District Court to the Supreme Court in any case that involved the construction or application of the Constitution of the United States. As according to the allegations of the bill, the jurisdiction of the District Court was invoked upon the ground that the controversy involved the construction or application of the Constitution and that alone, this court is without jurisdiction to entertain the appeal, for in such cases an appeal lies only to the Supreme Court. Carolina Glass Company v. South Carolina, 240 U. S. 305, 318. In that case it was said: "This writ brings up a judgment rendered by the Circuit Court of Appeals, Fourth Circuit, affirming the same final judgment of the District Court considered in No. 205, supra, 296 Fed. Rep. 635. There is no allegation of diverse citizenship and the trial court's jurisdiction was invoked solely upon the

ground that the controversy involved application of the Federal Constitution. In such circumstances the Circuit Court of Appeals is without jurisdiction to review. Union & Planters' Bank v. Memphis, 189 U. S. 71, 73."

[fol. 54] The appeal having been allowed before the Act of February 13, 1925, c. 229, 43 Stat. 936, took effect, the case must be transferred to the Supreme Court under the Act of September 14, 1922, c. 305, 42 Stat. 837 (Salinger, Jr. v. United States, decided by the Supreme Court November 23, 1926), and our previous order herein revoked.

Our decree in this case of March 3, 1926, is set aside and the case is transferred to the Supreme Court.

A true copy. Attest:

Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

[fol. 55] In United States Circuit Court of Appeals for the First Circuit

[Title omitted]

Decree—December 18, 1926

This cause came on to be heard on reargument on November 30, 1926, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel:

Upon consideration whereof, It is now, to wit, December 18, 1926, here ordered and decreed as follows: The decree in this case of March 3, 1926, is set aside and the case is transferred to the Supreme Court of the United States.

By the Court.

Arthur I. Charron, Clerk.

A true copy. Attest:

Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

[fols. 56 & 57] UNITED STATES OF AMERICA, SS:

IN SUPREME COURT OF THE UNITED STATES

STIPULATION AND ADDITION TO RECORD—Filed March 5, 1927

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that the paper hereto appended, being a copy of the Opinion of the Circuit Court of Appeals, First Circuit, in the above entitled cause, of March 3, 1926, and of the "Final Decree" of said Circuit Court of Appeals, of that same date, together with the certificate thereto appended of the Clerk of said Circuit Court of Appeals under date of February 9, 1927, may be filed in the Supreme Court of the United States and added to and made a part of the record of this cause therein with the same effect for all purposes as though the same had originally been included in the transcript of the record heretofore sent by the Clerk of said Circuit Court of Appeals, First Circuit, to the Clerk of the Supreme Court in this cause.

William Cattron Rigby, Attorney for Appellant.
Ezra P. Prentice, Nelson Gammans, Attorneys for Appellee.

Dated February 15, 1927.

[fol. 58] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1925

No. 1862

JUAN G. GALLARDO, Treasurer, Defendant, Appellant,

v.

SANTINI FERTILIZER CO., Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Porto Rico

Before Bingham, Johnson and Anderson, JJ.

OPINION OF THE COURT—March 3, 1926

JOHNSON, J.:

This is an appeal from a decree of the District Court of the United States for the District of Porto Rico, in a bill in

equity filed by the defendant in error, a corporation organized under the laws of Porto Rico, against the Treasurer of Porto Rico, and both are citizens and residents of that island. They will be designated for convenience as in the original bill.

The complaint alleges that the complainant is engaged in the business of buying and importing into Porto Rico from the United States and from foreign countries fertilizers and raw materials therefor; in manufacturing commercial fertilizers and in selling raw materials and the manufactured product; that, under the law of Porto Rico, the value placed upon its merchandise for the purpose of taxation for the year 1923-4 was largely in excess of the value for which it [fol. 59] could legally be assessed; that, in the merchandise held by it upon its dock and warehouse in the City of San Juan, were the original bags in which materials from which fertilizer is made had been imported from Germany and France, which it claimed retained their character of imports from foreign countries and were at the time when the tax was assessed exempt from local taxation; that complainant appealed to the Board of Equalization and Review from the assessment that was made upon its property, but that this assessment was confirmed by this Board; that a tax amounting to $6,844.56 was assessed upon its stock of merchandise for the year 1923-4, which was $3,810.93 in excess of the tax which should have been assessed, and that, upon its failure to pay said tax, the defendant, as Treasurer of Porto Rico, has threatened to seize and sell sufficient property of the complainant to satisfy said tax or any unpaid portion thereof; that the tax was illegally assessed upon its stock of merchandise because the full amount of said stock on hand January 15, 1923, the date upon which the property tax in Porto Rico is assessed, was assessed at its average market value during the year next preceding the time of assessment, whereas it should have been assessed upon the average amount of said stock during the preceding year at its average market value. The tax was assessed under secs. 294, 295 and 297 of the Political Code of Porto Rico.

Sec. 294, so far as material in defining the property to be taxed, is as follows:

"So much of the property of any manufacturer, merchant or tradesman as may consist of stocks of material or mer-

chandise shall be listed separately and assessed upon its average market value during the year next preceding the time of assessment."

Sec. 295 provides, in part, that it shall be the duty of the assessor in each assessment district to fill out an assessment schedule showing in as great detail as is practicable all personal property subject to taxation on January 15th in each year to each taxable person.

Sec. 297 provides that such personal property as goods, wares, merchandise and other stock in trade shall be as- [fol. 60] sessed to the owner in the municipality in which it is situated. Although no objection to the jurisdiction of the District Court was raised below nor argued before us, yet, counsel have, at our request, submitted briefs upon it.

By sec. 41, ch. 145 of Act of Congress approved March 2, 1917, popularly known as the "Jones Act," it is provided that the District Court for the District of Porto Rico—

"shall have jurisdiction of all cases cognizable in the District Courts of the United States, and shall proceed in the same manner. Said court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory or district of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of $3,000."

It was the evident purpose of Congress in this Act to narrow somewhat the jurisdiction of the District Court from that which it had been granted under the preceding Act of Congress of April 12, 1900, known as the "Foraker Act."

See

Porto Rico Ry. Light & Power Co. v. Mor, 253 U. S. 345.

In the present case there is no diversity of citizenship. Both plaintiff and defendant are citizens and residents of Porto Rico, but jurisdiction is claimed for the District Court because the complaint alleges that part of the tax was assessed upon imports from foreign countries in violation of par. 3, sec. 8, art. I, of the Constitution of the United States.

Only those provisions of the Constitution of the United States are in force in Porto Rico which in their nature are applicable thereto.

Balzac v. Porto Rico, 258 U. S. 298, 305.
Dorr v. United States, 195 U. S. 138.

The Act of Congress of March 2, 1917, known as the "Jones Act," has extended to Porto Rico many provisions of the Constitution, in terms, and also some provisions of the Customs Laws; but no provision of the "Jones Act" or of the Customs Laws is set out or alleged in the plaintiff's [fol. 61] bill as a ground of Federal jurisdiction.

The clause of the Constitution which states that, "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws," is clearly a limitation upon the powers of the States and not applicable to Porto Rico. But, even if the "Jones Act" or the Customs Laws, as applicable to Porto Rico, do contain provisions relating to imports from foreign countries, so that their construction were called in question by the allegations in the bill, jurisdiction would not thereby be conferred upon the District Court of Porto Rico.

Its jurisdiction, by the "Jones Act," is made to extend to "all cases cognizable in the District Courts of the United States."

Under sec. 24 of the Judicial Code jurisdiction is conferred upon the District Courts of the United States in all suits of a civil nature—

"Where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and (a) arises under the Constitution or laws of the United States."

If the provision of the "Jones Act" make the tax which was assessed upon the alleged imports unlawful then the amount of the tax involved in such alleged illegal assessment is less than three thousand dollars.

The bill of complaint alleges the value of the imports which were taxed to be $26,131, and that the rate of taxation in the City of San Juan for the years in question was 2 24/100 per cent, making therefore the tax upon the alleged imports $585.33.

While the plaintiff in its bill seeks to restrain the collection by the Treasurer of Porto Rico of $3,810.93, which it alleges to have been unlawfully assessed and void, yet it alleges that the greater part of this tax was unlawfully assessed, because of a wrong construction placed upon the law of Porto Rico, a purely local question in no way connected with or to be determined by the Federal question which is sought to be raised.

The plaintiff has in its bill stated two causes of action: [fol. 62] one dependent upon the determination of a Federal question, provided, under the laws of the United States relating to imports into Porto Rico from foreign Nations the taxation of such imports is unlawful; and the other grounded upon what it alleges to have been a wrong construction of the law of Porto Rico by the taxing authorities. These two causes of action are entirely distinct and in no way connected.

While under Equity Rule 26 the plaintiff is authorized to "join in one bill as many causes of action cognizable in equity as he may have against the defendant," yet the Supreme Court said in Geneva Furniture Company v. Karpen, 238 U. S. 254, 259:

"It hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the Court is without jurisdiction, with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must of course yield to the jurisdictional statute."

See also:

Cushman v. Atlantis Fountain Pen Co., 164 Fed. 94.
National Casket Co. v. New York & Brooklyn Casket Co., 185 Fed. 533.
Johnston v. Brass Goods Mfg. Co., 201 Fed. 368.

The amount of the alleged unlawful tax upon imports, if it be conceded to have raised a Federal question, is not sufficiently large to give the court jurisdiction.

See

Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 508.

In West India Oil Co. v. Gallardo, Treasurer, 6 Fed. (2d) 423 we held that the Act of Porto Rico providing for an action at law to recover taxes paid under protest did not afford an adequate remedy at law; but that equity had jurisdiction to restrain collection of an illegal tax. In that case, however, the plaintiff in error was a New Jersey corpora- [fol. 63] tion. There was diversity of citizenship and the requisite amount was involved to confer jurisdiction.

The question now presented is not whether the plaintiff in error had an adequate remedy at law, but whether the District Court had jurisdiction. As we think it did not have jurisdiction, the entry must be:

The decree of the District Court is reversed and the action is remanded to that court with instruction to dismiss the same, with costs to the appellant in this court.

FINAL DECREE—March 3, 1926

This cause came on to be heard October 20, 1925, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel:

Upon consideration whereof, It is now, to wit, March 3, 1926, here ordered, adjudged and decreed as follows: The decree of the District Court is reversed and the action is remanded to that court with instruction to dismiss the same, with costs to the appellant in this court.

By the Court:

Arthur I. Charron, Clerk.

[fol. 64] CERTIFICATE

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing are true copies of the Opinion of the Court of March 3, 1926, and the Final Decree entered on said March 3, 1926, vacated by decree of December 18, 1926, in the above entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for

the First Circuit, at Boston, in said First Circuit, this ninth day of February, A. D. 1926.

Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

[fol. 64a] [File endorsement omitted.]

[fol. 65] In Supreme Court of the United States

Statement of Points to be Relied upon and Designation by Appellant of Parts of the Record to be Printed—Filed February 5, 1927

I

Points on Which Appellant Intends to Rely

1. The court erred in refusing to grant the motion to dismiss made by the defendant in open court, and at the close of the evidence offered by the plaintiff.

[fol. 66] 2. The court erred in granting a perpetual injunction in the final decree in favor of plaintiff, Santini Fertilizer Company, enjoining the collection of the taxes in the whole of $6,844.56 assessed on the personal property of said plaintiff and for the year of 1923.

3. The court erred in the construction and interpretation of Section 294 of the Political Code of Porto Rico, in holding that the personal property of complainant had to be assessed, considering as the basis the average of property during the preceding year in possession of complainant, and not the property held on the 15th of January, according to the market value of said property during the preceding year.

4. The court erred in the interpretation of the words "average market value" as provided in Article 294 of the Political Code of Porto Rico.

5. The court erred in the construction and interpretation of what constitutes the stock of material or merchandise in

hand of complainant in this case, according to Section 294 of the Political Code of Porto Rico.

6. The court erred in holding that the mode of assessment executed by the defendant in this case did not conform to the provisions of Article 294 of the Political Code of Porto Rico.

7. The court erred in the construction and interpretation of Article 297 of the Political Code of Porto Rico, in holding that said article and Section 294 of the same code were contradictory and imposed a double taxation on the same personal property.

8. The court erred in considering applicable to this case the decision of the Supreme Court of the State of New Hampshire in the case of International Paper Co. v. Town of Walpole, 75 N. H. Rep. 320, 74 Atl. 180.

9. The court erred in determining the meaning of the wording of Section 297 of the Political Code of Porto Rico, [fol. 67] in connection with Section 294 of the same code, in holding that said Section 297 would justify the granting of a perpetual decree of injunction against defendant.

10. The court erred in refusing to hold that the assessment made to the plaintiff, Santini Fertilizer Company, did comply with Section 294 of the Political Code of Porto Rico.

11. The court erred in holding that the assessment made by the defendant in this case on the personal property of plaintiff, as held on January 15, 1923, was illegal and unenforceable.

12. The final decree of injunction in this case is against the manifest weight of the evidence.

13. The final decree of injunction in this case is contrary to law.

14. The court erred in holding that it had jurisdiction of this case and in not dismissing the suit for want of jurisdiction.

15. The court erred in not holding that the requisite jurisdictional amount was not involved.

16. The court erred in holding that the requisite jurisdictional amount was not involved because the tax assessed upon the portion of appellee's property which the bill alleged to consist of imported fertilizer materials on the dock and warehouse of complainant, appellee, in the original bags in which imported by complainant from foreign countries and alleged in the bill to retain their character of imports from foreign countries and as such to be exempt from property taxes imposed by the government of Porto Rico was less in amount than $3,000, as pointed out in the opinion of the Circuit Court of Appeals, First Circuit, of March 3, 1926, in this case, and that as to the balance of the tax complained of the questions presented in appellee's bill did not involve any Federal question.

[fol. 68] 17. The court erred in taking jurisdiction of this case and in not dismissing the bill for want of jurisdiction because there is here no diversity of citizenship and the only claim of jurisdiction of the Federal courts in the bill is based upon the allegation in paragraph 8 of the bill that the tax in question was levied in part upon merchandise imported by the complainant from foreign countries and still remaining on the tax date in question, January 15, 1923, on the dock in "original packages" in the hands of the original importer. But it is further alleged in the bill (paragraph 8) that the total value of such merchandise was only $26,131, and further that (Bill, paragraph 14) the tax rate was 2.24 per cent, whence it necessarily follows that the tax on said merchandise claimed to be exempt as in "original packages" was only $585.33, and was therefore less than the requisite jurisdictional amount.

18. The original appeal herein was properly taken to the Circuit Court of Appeals, First Circuit; and the Circuit Court of Appeals erred in not retaining jurisdiction thereof and in transferring this case to this court; and this case should be transferred back to the Circuit Court of Appeals, First Circuit.

19. For other errors appearing on the record.

II

Parts of the Record Which Appellant Thinks Necessary for the Consideration of the Foregoing Points

1. Bill of Complaint.
2. Answer.
3. "Order and Opinion" of the District Court, March 23, 1925.
4. Final decree of District Court, March 3, 1925.
5. Petition for Appeal, April 7, 1925.

[fol. 69] 6. Assignment of errors.

7. Order allowing appeal, April 7, 1925.
8. Statement of Evidence.
9. Exhibits appended to Statement of Evidence (pages of record numbered 46 to 49, inclusive; numbers stamped at lower left-hand corners).
10. Praecipe, April 27, 1925.
11. Certificate of Clerk of District Court to record.
12. Opinion of Circuit Court of Appeals of March 3, 1926 (supplemental record).
13. Decree of Circuit Court of Appeals, March 3, 1926 (supplemental record).
14. Opinion of Circuit Court of Appeals on rehearing, December 18, 1926.
15. Order of Circuit Court of Appeals, December 18, 1926, transferring case to Supreme Court.

William Cattron Rigby, Lieutenant Colonel, Judge Advocate, Room 140 State, War & Navy Bld., Washington, D. C., Attorney for Appellant.

United States of America,
District of Columbia, ss:

William Cattron Rigby being first duly sworn on oath deposes and says that he is the attorney for the appellant in the above entitled cause, and further that on this date, February 5, 1927, he served a copy of the foregoing statement of the points on which appellant intends to rely in [fol. 70] this court and of the parts of the record which he thinks necessary for the consideration thereof upon the adverse party, Santini Fertilizer Company, appellee, by

mailing a true copy of the foregoing statement to Nelson Gammans, Esq., Attorney for said Appellee, at his office, #55 Liberty Street, New York City, properly inclosed in an official franked envelope, sealed and addressed.

William Cattron Rigby, Attorney for Appellant.

Subscribed and sworn to before me this 5th day of February, 1927. J. B. Randolph, Notary Public. My commission expires Oct. 3, 1930. (Seal.)

[fol. 71] [File endorsement omitted.]

Endorsed on cover: File No. 32,407. Porto Rico D. C. U. S Term No. 840 Juan G. Gallardo, treasurer, appellant, vs. Santini Fertilizer Company. Transferred from the United States Circuit Court of Appeals for the First Circuit under the Act of September 14, 1922 (c. 305, 42 Stat., 837). Filed January 21st, 1927. File No. 32,407.

May 31, 1927

MAY [illegible] 1927

WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1926.

No. 164

JUAN C. GALLARDO, TREASURER,
Defendant-Appellant,

vs.

EASTERN FERTILIZER COMPANY,
Complainant-Appellee.

Appeal from the District Court of the United States for the District of Porto Rico, Transferred from the United States Circuit Court of Appeals for the First Circuit under the Act of September 14, 1922.

MOTION OF APPELLANT TO TRANSFER THE CASE BACK TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT,

AND

BRIEF IN SUPPORT OF SUCH MOTION.

WILLIAM CATTRON RIGBY,
Lieutenant Colonel, Judge Advocate,
Attorney for Appellant.

GEORGE C. BUTTE,
Attorney General of Porto Rico,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 840.

JUAN G. GALLARDO, TREASURER,
Defendant-Appellant,

vs.

SANTINI FERTILIZER COMPANY,
Complainant-Appellee.

Appeal from the District Court of the United States for the District of Porto Rico, Transferred from the United States Circuit Court of Appeals for the First Circuit under the Act of September 14, 1922.

MOTION OF APPELLANT TO TRANSFER THE CASE BACK TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

And now comes the said Juan G. Gallardo, Treasurer of Porto Rico, defendant-appellant in the above entitled cause, and moves that this court transfer this case back to the Circuit Court of Appeals, First Circuit, for decision there upon the appeal originally prayed by this appellant to that court from the United States District Court for the District of Porto Rico. And as grounds for this motion appellant shows to the court here that said Circuit Court of Appeals, First Circuit, erred in transferring this cause from that court to this court under the Act of September 14, 1922 (42 Stat. 837) by decree of said Circuit Court of Appeals, December 18, 1926 (R. 34), because,

as this appellant respectfully says and submits to the court here, this appellant's original appeal herein was properly taken to said Circuit Court of Appeals, First Circuit, under Section 128, *Judicial Code, as amended January 28, 1915* (Sec. 2, Act of January 28, 1915, 38 Stat. 803), which was in force March 31, 1925, the date of the decree of the United States District Court for the District of Porto Rico, from which said appeal was prayed, as well as on April 7, 1925, when the appeal was allowed by the said District Court; and therefore that the said Circuit Court of Appeals erred in not retaining jurisdiction thereof, and erred in transferring this case to this Honorable Court; and, therefore, that this case should now be transferred back to said Circuit Court of Appeals, under said Act of September 14, 1922.

WILLIAM CATTRON RIGBY,
Lieutenant Colonel, Judge Advocate,
Attorney for Appellant.

GEORGE C. BUTTE,
Attorney General of Porto Rico,
Of Counsel.

BRIEF IN SUPPORT OF MOTION TO TRANSFER THIS CASE BACK TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

STATEMENT OF THE CASE.

This was a bill in equity in the United States District Court for Porto Rico filed by the appellee corporation, Santini Fertilizer Company, to enjoin the defendant-appellant, Treasurer of Porto Rico, from collecting certain Insular taxes levied against complainant. There is no diversity of citizenship; so that complainant's claim of federal jurisdiction rests upon the alleged federal questions involved. The District Court having entered its final decree in favor of the complainant-appellee on March 31, 1925, the defendant Treasurer appealed to the Circuit Court of Appeals, First Circuit, under Section 128 of the Judicial Code, as amended January 28, 1915 (Sec. 2, Act of January 28, 1915, 38 Stat. 803), which was in force on the date of the entry of the decree as well as on April 7, 1925, the date when the appeal was allowed by the District Court. The appeal was thus taken to the Circuit Court of Appeals under Section 128 of the Judicial Code (instead of to this court under Section 238 of that Code) because appellant understood appellee's bill of complaint as well as the decree of the District Court to proceed upon the theory that the tax in question was violative of the federal Organic Acts for Porto Rico (the Foraker Act and the Jones Act) and other related federal statutes,—as well as upon appellee's alleged constitutional rights under the United States Constitution. Upon the original argument in the Circuit Court of Appeals, appellee raised no question of the jurisdiction of that court, and did not suggest that the appellee should have directly come to this court instead of going to the Circuit Court of Appeals, and made no claim that only constitutional questions were involved; but on the contrary, in its original brief in that court (pp. 5–8, Complainant-Appellee's brief in the Circuit Court of Appeals herein; Appendix I, *infra*, pp. 21–24) stated to that court federal questions claimed to be involved under the organic acts for Porto Rico and other statutes of Congress; and argued those questions.

Accordingly, appellant now presents to the court here, and asks to file in connection with this motion, certified copies of the original briefs on both sides in that court, and of appellee's petition for rehearing therein and the briefs on both sides on the rehearing.

The Circuit Court of Appeals on March 3, 1926, handed down its opinion and entered its decree, reversing the decree of the District Court and remanding the case to that court with directions to dismiss appellee's bill of complaint for want of jurisdiction (R. 35–40). Thereafter on March 31, 1926, complainant-appellee filed its petition for rehearing in the Circuit Court of Appeals, and its brief in support thereof, in which, *for the first time*, it asserted (petition for rehearing, Point I, p. 1; brief in support thereof, pp. 1–3; certified copies thereof now presented to this court)that appellant's bill of complaint in the District Court raised no federal questions other than *constitutional questions*, and therefore that this appeal from the District Court should have been originally taken to this court under Section 238 of the Judicial Code as amended by the Act of January 28, 1915, and as in force on the dates of said decree of the District Court and of the allowance of the appeal therefrom by that court (March 31, 1925, and April 7, 1925, respectively), as a case involving only "*the construction or application of the Constitution of the United States*" and no other federal question, instead of to the Circuit Court of Appeals under Section 128 of the Judicial Code, as appellant had done.

The Circuit Court of Appeals on November 4, 1926, requested argument upon the petition for rehearing on two questions only, viz:

> "(1) Whether this appeal should have been taken to this court" (i. e., said Circuit Court of Appeals), "or directly to the Supreme Court"; and
>
> "(2) If the appeal should have been taken directly to the Supreme Court, whether the appeal was seasonably taken and may now be transferred to the Supreme Court, or must be dismissed."

Briefs having been submitted on both sides on both these questions, the Circuit Court of Appeals on December 18, 1926,

handed down its opinion on rehearing and entered its final decree (R. 32–34) setting aside its former decree of March 3, 1926, and transferring this case to this court under the Act of September 14, 1922 (42 Stat. 837).

The defendant-appellant, Treasurer of Porto Rico, now moves to transfer the case back to the Circuit Court of Appeals.

THE ISSUES PRESENTED BY THE COMPLAINANT'S BILL OF COMPLAINT IN THE TRIAL COURT.

Complainant-appellee's bill of complaint in the District Court alleged, *inter alia*, that complainant is a Porto Rico corporation (Par. 1, R. 1), and that (Par. 3, R. 1) the amount here in controversy "exceeds the sum of $3,000, exclusive of interest and costs"; that complainant is, and has been for several years, engaged in "buying and importing from the States of the United States and from foreign countries fertilizers and raw materials therefor, and in manufacturing commercial fertilizers, and in selling raw materials and the manufactured product"; that (Par. 6, R. 2) the defendant Treasurer of Porto Rico (or his predecessor in office) assessed complainant's taxable property on hand January 15, 1923, and, in so doing, included "one item of $296,761, the alleged value of merchandise in the hands of complainant" on that date; that (Par. 8, R. 2–3) part of such stock on hand on that date consisted of various amounts of nitrate of soda, sulphate of potash, muriate of potash, bone meal and cotton seed meal, of the aggregate value of $26,131,"

> "all of which merchandise, on January 15, 1923, was on the dock and warehouse of the complainant in the City of San Juan *in the original bags* in which same had been imported from Germany and France by complainant and which *consequently retained its character of imports* from foreign countries *and was* at the time *exempt as such from any property or other taxes imposed or which could be imposed by the government of Porto Rico*" (italics ours).

That (Par. 9, R. 3) the assessment was confirmed, on complainant's appeal, by the Board of Review and Equalization of Porto Rico; and that the defendant Treasurer (Par. 10, R. 3)

"threatens" to include in his assessment of complainant's property tax for the year 1924–1925,

> "*merchandise* in the hands of complainant on January 15, 1924, *in the original packages in which the same has been imported* by complainant from foreign countries and which had *not yet become mingled in the local commerce of Porto Rico*" (italics ours).

That (Par. 11, R. 3–4) defendant Treasurer has demanded payment of the 1923–1924 property tax based on such 1923 assessment, and threatens to take steps to enforce it. That—(in addition to allegations that defendant's method of assessment is, in respect to another unrelated matter,—viz., his interpretation of the phrase "average market value," as used in Section 294, Political Code of Porto Rico,—violative of local law)—defendant's acts "are *furthermore illegal and without warrant of law*" (Par. 13, R. 5),

> "in that said Political Code as construed by the taxing officers of the Government purports to tax goods imported from foreign countries *while still in the original packages in the hands of the original importer and before the same have become mingled in the commerce of the Island of Porto Rico;* all of which is *in violation of* the Constitution of the United States, and especially of *paragraph 3 of Section 8 of Article I* thereof" (italics ours);—that is to say, of the "commerce clause."

THE FOREGOING IS THE ONLY ALLEGATION OF A CONSTITUTIONAL QUESTION CONTAINED IN THE BILL OF COMPLAINT.

No issue was made in the District Court as to that Court's jurisdiction. The existence of the jurisdictional amount in controversy was, in fact, expressly admitted by defendant's answer (Par. 1, R. 9), and it was not questioned in the assignment of errors filed in the District Court (R. 18–20) on April 7, 1925, the date the appeal was allowed by that court, to the Circuit Court of Appeals (R. 20).

BRIEF

POINT I.

THIS APPEAL WAS PROPERLY TAKEN FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

The appeal was properly taken to the Circuit Court of Appeals under Section 128, Judicial Code, as amended January 28, 1915 (Section 2, Act of January 28, 1915, 38 Stat. 803), which was in force March 31, 1925, the date of the decree below, as well as on April 7, 1925, when the appeal was allowed.

A. Section 238, Judicial Code, as amended by the Act of January 28, 1915, and as in force on the dates of said decree and appeal, provided for direct appeals to and writs of error from the Supreme Court in the following cases, only, *under none of which this case falls*, viz:

1. "In any case in which the jurisdiction of the court is in issue."

"in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

2. From the final sentences and decrees in prize causes. (Nothing of that kind in this case.)

3. In any case that involves the *construction* or *application of the Constitution of the United States.*

4. In any case in which the constitutionality of any law of the United States is drawn in question.

5. In any case in which the validity or construction of any treaty made under the authority of the United States is drawn in question.

6. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Sec. 238, Judicial Code, as amended by Act of Jan. 28, 1915 (38 Stat. 804; par. 1215, Comp. Stat. 1916).

B. Manifestly this case is not within either of the clauses of Section 238 which we have numbered above "2," "4", "5", or "6". It is not a prize case; the constitutionality of no law of the United States is here drawn in question; no treaty is involved; nor is the constitution or law of any State here claimed to be in contravention of the Federal Constitution.

C. Nor is this case within the *first* clause of Section 238. No "*issue*" was made below of the jurisdiction of the District Court; nor was any question of jurisdiction "*certified*" up from that Court for a decision.

It is only questions of jurisdiction thus "certified" up, upon which an "issue" was made in the District Court, that are covered by this clause of Section 238. This clause only

> "provides for direct appeals from the District Court to this Court in *certified questions* of jurisdiction of the District Court" (italics ours).
>
> *McMillan Co.* v. *Abernathy*, 263 U. S. 438, 441 (TAFT, CH. J.)
>
> *Only, if certified up by the District Court.*
>
> *Smith* v. *Apple*, 264 U. S. 274, 277.

D. There remains the question whether this appeal was required to go to the Supreme Court under the clause of Section 238 which we have numbered "3" above, viz., "In any case that involves the *construction* or *application of the Constitution* of the United States."

(a) The appeal was not required to go to the Supreme Court, even though a substantial constitutional question were presented by the pleadings, UNLESS that was the sole question presented supporting Federal jurisdiction.

If the case also involves other federal questions, then *the defeated party may elect* whether to go to the Supreme Court, or to the Circuit Court of Appeals.

> *Harris* v. *Rosenberger*, 145 Fed. 449, 451-452 (certiorari denied in *same case*, 203 U. S. 591).
>
> *Hooper* v. *Remmel*, 165 Fed. 336, 338.
>
> *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 406-408.

(For quotations from the opinions of the courts in the above cited cases, as to this point, see infra, "Appendix", pp. 25-27).

(b) A CONSTITUTIONAL QUESTION IS NOT PRESENTED, within the meaning of this clause of Section 238, by a "mere reference to a provision of the Federal Constitution" in the bill of complaint, nor by "the mere as-

sertion of a claim under it", UNLESS *the question thus presented be substantial and not frivolous, and not foreclosed by previous decisions of the Supreme Court.*

If the question sought to be raised is foreclosed by previous decisions of the Supreme Court, then the claim of it in the bill is "not substantial but frivolous."

> *Heitler* v. *United States*, 260 U. S. 438, 439 (TAFT, CH. J.).

So also, if, on the facts alleged in the bill, it is, under such previous decisions, *legally impossible* for any question of the construction or application of the Constitution to be really involved in the case.

Thus, even though the pleadings below explicitly state that the case involves the construction or application of the Constitution of the United States, yet, if the claim so stated be thus "frivolous", or has been so absolutely foreclosed by previous rulings of the Supreme Court as to leave no room for real controversy, then Section 238, Judicial Code, did not authorize an appeal to the Supreme Court because of such claim; and such an appeal, if taken, would be dismissed by the Supreme Court.

> *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344–346.
> *Eq. Lf. Assur. Soc.* v. *Brown*, 187 U. S. 308, 311 (WHITE J.).
> *Farrell* v. *O'Brien*, 199 U. S. 89, 100–101.
> *Merriam Co.* v. *Syndicate Pub. Co.*, 237 U. S. 618, 621.
> *Sugarman* v. *United States*, 249 U. S. 182, 184 (BRANDEIS, J.).
> *Piedmont Power & Light Co.* v. *Graham*, 253 U. S. 193, 195.
> *Heitler* v. *United States*, *supra*, 260 U. S. 438, 439 (TAFT, CH. J.), and *ibid*, 260 U. S. 703.
> (*For quotations from the foregoing cases, see infra*, "*Appendix*", *ff.* 27–31).

E. The only constitutional question sought to be presented by the bill of complaint here is the claim that the levy of Porto Rican taxes on goods imported from foreign countries "while still in the original packages in the hands of the original importer and before the same have become mingled in the commerce of the Island of Porto Rico" (Bill of Complaint, Par. 13;

R. 5) is violative of the "commerce clause" (Cl. 3, Sec. 8 of Art. I) of the Constitution.

(a) *But it is manifest,* upon a mere reading of this allegation, in connection with the facts alleged in the bill, that, under the settled doctrines of this Court, *it is legally impossible for any question of the construction or application of the "commerce clause" to be really involved in this suit;* since that clause is definitive of the correlative rights of the United States and of the individual States, and since no question of State power, as distinguished from Federal power, can possibly arise here, Porto Rico not being a State, and its legislature being merely an agent of the Congress. The validity of its acts, therefore, in so far as the questions presented by the facts alleged in this bill are concerned, is to be determined, not by a consideration of any of the clauses of the Constitution defining the correlative powers of the Federal Government and of the States, but solely by an examination of the Organic Act for Porto Rico and other acts of Congress, to determine whether or not the construction alleged to have been placed by the taxing officers (Bill of Complaint, Par. 13, *supra*, R. 5) upon the acts of the Porto Rican Legislature is violative of those acts of Congress.

That, as noted by the Circuit Court of Appeals in its original opinion of March 3, 1926, in this case (R. 38) is the only federal question really presented by the bill of complaint here.

But that is a question of the construction of acts of Congress, upon which appellant's appeal from the District Court was properly taken to the Circuit Court of Appeals under Section 128 of the Judicial Code, instead of to this Court. It is not a question involving either the construction or the application of the Constitution.

(1) That Porto Rico is, for these purposes, not to be classed as a State; and that its territorial Legislature is an agent of the Congress, *exercising,* within the limits of the authority delegated to it by Congress, *federal power,*—as contradistinguished from the sovereign powers of a State of the Union,—is well settled.

United States v. *Heinszen & Co.*, 206 U. S. 370.
Dooley v. *United States*, 182 U. S. 222.
Dorr v. *United States*, 195 U. S. 138.
Parsons v. *District of Columbia*, 170 U. S. 45, 56.
Binns v. *United States*, 194 U. S. 486.

Rafferty v. *Smith, Bell & Co.*, 257 U. S. 226.
Alaska v. *Troy*, 258 U. S. 101.
Balzac v. *Porto Rico*, 258 U. S. 298.

(b) Therefore, the allegation in paragraph 13 of the Bill of Complaint here (R. 5, *supra*), that the acts of the defendant and other taxing officers there assailed are violative of the "commerce clause" of the Constitution, is, within the meaning of the decisions of the Supreme Court hereinbefore cited (Point I–D–(b), pp. 8–9, *supra*), "not substantial but frivolous"; and was not sufficient to support (much less to *require*) a direct appeal to this Court from the District Court under Section 238 of the Judicial Code.

F. But, in any event—whether or not a substantial constitutional question may be held to be also presented by it—THE BILL OF COMPLAINT DOES PRESENT ON ITS FACE ANOTHER SUBSTANTIAL FEDERAL QUESTION ARISING UNDER FEDERAL LAWS (that is to say, under acts of the Congress), SUFFICIENT IN ITSELF TO SUSTAIN THE JURISDICTION OF THE FEDERAL COURTS; (if the requisite jurisdictional amount were involved); viz., *the question of the validity, under the Organic Act of Porto Rico and other acts of Congress, of the Porto Rican statutes in question*, as interpreted by the taxing officers of that Island—a question necessarily involving the construction and application of those Acts of Congress.

(a) The allegations of the bill (Pars. 5, 6, 8, 10, and the first clause of the last sentence of paragraph 13; R. 1–3, 5; and see "Statement of the Case," *ante*, pp. 5–6 hereof) fully present this question, entirely independently of the allegation of the alleged constitutional question in the concluding two and a half lines of paragraph 13. If the concluding clause (last two and a half lines) of said paragraph 13 be stricken out or disregarded as surplusage, the bill yet remains sufficient on its face to present this federal question under the organic law ("Jones Law") and other acts of Congress relating to the Insular Government.

Furthermore, the final decree of the District Court in so far as it relates to the "original packages" (Decree, pars. 4 and 5; R. 17) does not mention the "commerce clause", or any other clause of the Constitution; but may be said to be grounded upon the Organic Act and other laws of Congress (and will be

presumed to have been intended to be so grounded; since those laws are really applicable to the case, whereas the "commerce clause" of the Constitution is not.

(1) *If the District Court's decree had expressly found that the "commerce clause" of the Constitution was not involved,* and had then proceeded to make precisely the same findings that it does make (Decree, par. 4, R. 17) and the same decretal order which it now contains (*ibid*, par. 5, R. 17), then, manifestly, there would have been no constitutional question involved in the decree upon which this appellant could, as the "defeated party" complaining of the decree, base an appeal directly to the Supreme Court,—regardless of the allegation of a constitutional question in the bill. In that case, manifestly, the only way in which a direct appeal to the Supreme Court could possibly have been sustained would have been upon a cross appeal by complainant, complaining of that part of the decree finding against it on that specific question,—viz. of such supposed express finding that the "commerce clause" was not involved. There is no such cross appeal here. Complainant (appellee) makes no complaint of any part of the decree.

Yet in effect this decree actually does exactly the same thing that would have been effected by such an express finding as above supposed. It wholly omits to make any finding that, as the bill had alleged, the acts of defendant in question were violative of the "commerce clause", or of any other clause, of the Constitution.

That omission is significant, and must be presumed to express the deliberate considered determination of the trial judge. In other words, he finds in effect that the acts alleged are not, as was claimed by the complainant in the concluding clause of paragraph 13 (R. 5) of its bill of complaint, really violative of the "commerce clause" of the Constitution; but he does find the facts substantially as alleged in the bill (Decree, par. 4, R. 17), and proceeds to give the complainant a decree perpetually enjoining defendant from assessing against the complainant

> "any property tax upon fertilizers or other goods unsold in the hands of complainant in the original packages in which the same were imported by complainant from foreign countries." (Decree, par. 5, R. 17.)

Necessarily, that means that the District Judge rested his decree upon the general laws in force applicable to Porto Rico,

viz., upon the Organic Act and other acts of Congress. If he had meant to rest it solely upon the alleged violation of the "commerce clause" claimed in the bill of complaint, he would undoubtedly have gone along with the bill and made the corresponding finding, *which is significantly omitted from the decree.*

In other words, so far as any alleged violation of the "commerce clause" was concerned, the finding of the District Court was *with the defendant* (appellant); and not with the complainant. *Therefore, as to that question, which would have been the sole possible basis for a direct appeal to the Supreme Court, the court's finding having been with him and not against him, appellant had no ground for such direct appeal to the Supreme Court.* There was, as to that question, nothing for him to complain of,—no finding against him. And, therefore, no constitutional issue for him to take to the Supreme Court.

(b) Therefore, since this independent federal question, under the Organic Act and other acts of Congress, is thus properly presented on the face of the bill and upon the decree of the District Court, it follows that, under the authorities hereinbefore cited (Point I—D-(*a*), p. 8, *supra*), this appeal was properly taken to this court under Section 128 of the Judicial Code, instead of directly to the Supreme Court under Section 238; because:

(1) If the alleged constitutional question hereinbefore in sub-point "E" of this Point (pp. 9-11, *ante* of this brief) discussed, be held to be (contrary to appellant's belief) actually a substantial constitutional question properly presented by the bill; then, in view of the independent federal question arising under the acts of Congress thereby also presented, *the defeated party had his election whether to appeal from the District Court directly to the Supreme Court or to the Circuit Court of Appeals*, and properly exercised that election by the appeal to the latter court; and, on the other hand,

(2) If the alleged constitutional question sought to be presented by the bill be held to be—(as the appellant respectfully submits it should be)—not a substantial constitutional question, for the reasons hereinbefore in sub-point "E" (pp. 9-11, *ante*) of this point of this brief discussed,—or, in any event, to have been eliminated by

the final decree below, so far as any ground for appeal by the defendant (appellee) is concerned (sub-point "F"—(*a*)—(1), pp. 12–13, *ante*),—then there existed (and exists) no ground for a direct appeal to the Supreme Court under Section 238 of the Judicial Code, and the appeal was necessarily, and properly, taken from the District Court to the Circuit Court of Appeals, under Section 128.

G. *In either event it follows that the appeal was properly taken to the Circuit Court of Appeals.*

POINT II.

APPELLEE IN ITS BRIEF IN THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, IN THIS CASE (certified copy of briefs in the Circuit Court of Appeals filed in this court) EXPRESSLY STATED THAT THE CONSTRUCTION OF A FEDERAL STATUTE,—THE ORGANIC ACT OF PORTO RICO (39 Stat. 951, *et seq.*),—WAS HERE INVOLVED.

> "Brief for Complainant-Appellee" in the Circuit Court of Appeals (certified copy filed in this court), pp. 5–8; pertinent portion reprinted in Appendix I. hereto, pp. 21–24, *infra*.

(A) Appellee in that brief in the Circuit Court of Appeals stated, under the subheading "APPLICABILITY OF RULE TO PORTO RICO", that:—

> "It is an academic question whether the violation is one of the federal constitution in so far as it is extended to Porto Rico, *or of the Organic Act* in so far as it adopts parts of the federal constitution.
>
> "*It is admitted that Congress* • • • *can authorize* THE LEGISLATURE OF PORTO RICO TO TAX IMPORTS IN THE ORIGINAL PACKAGES. *The first real question is whether Congress has granted* to the Legislature of Porto Rico the power • • • •.
>
> "Certain sections of the Foraker Act and Jones Act • • • vest certain legislative power in the Insular Legislature. Other sections, • • • extend federal laws to Porto Rico. *These sections must be construed together.*" (p. 5) • • • •
>
> "*The question is whether Congress* • • • *meant* • • • *and whether Congress intended* to authorize taxes interfering with foreign commerce.

"*For the answer to this question we must examine* not merely the restrictions in Sections 15, 32 and 38 of the Foraker Act and in Sections 3, 37 and 57 of the Jones Act, but also those sections which extend federal laws to Porto Rico." (p. 6) * * *

"From the specific exception of internal revenue laws in Section 9 of the Jones Act, one would suppose * * * *.

"Congress has apparently desired * * *. Congress certainly never intended that the Legislature of Porto Rico could * * * *." (p. 7) * * * *

"In the case of Porto Rico, Congress has covered the case of imports from foreign countries * * *. It covered the case of exports by the specific provisions of Section 38 * * *. What more should it reasonably be required to do to *indicate its intention that* * * * * *. Taxes * * * are forbidden to Porto Rico by Section * * * of the Foraker Act as continued by Section 58 of the Jones Act. * * * *.

"* * * *. The intention of Congress in the Organic Act and preceding federal statutes seems clearly to have been * * *. At least, *Congress certainly never intended* the Insular Government to have more power over matters affecting foreign powers than a sovereign State of the American Union." (p. 8) (*italics ours*).

Brief of complainant-appellee in the Circuit Court of Appeals, supra, pages 5, 6, 7, 8; Appendix I, hereto, *infra*, pp. 21-24.

It is perfectly clear, therefore, *that complainant-appellee*, when it argued this case on the merits in the Circuit Court of Appeals, *believed that questions of the construction of those acts of Congress*, viz., the two organic acts of Porto Rico, the former act of April 12, 1900, known as the Foraker Act (31 Stat. 77,), and the present organic act known as the Jones Act (39 Stat. 951), *were presented by their bill of complaint, and were involved in the case.*

In other words, it is apparent that complainant-appellee was, up to that time, in agreement with defendant-appellant, and with the Judge of the District Court of Porto Rico, in construing the bill as involving the construction of these

federal statutes as well as the alleged constitutional question;—(*if it really considered that any substantial federal question was actually involved at all.* Presumably appellee's counsel drafted the form of the final decree of the District Court of March 31, 1925, R. 16–17, which, as hereinbefore pointed out, *ante*, pp. 12–13, does not mention any constitutional question.)

(B) It appears from the record in this case that *the first time that it ever occurred to appellee, or its counsel, to claim that its bill of complaint herein was not intended to rely upon any question of construction of the organic acts of Porto Rico* or other federal statutes (but to involve only the alleged constitutional questions, and no other federal questions) *was after this cause had been argued and submitted to the Circuit Court of Appeals and after it had been decided adversely to appellee by the Circuit Court of Appeals* by the latter court's opinion and decree of March 3, 1926; when, by its petition for rehearing dated March 31, 1926, appellee FOR THE FIRST TIME raised the question of jurisdiction of the Circuit Court of Appeals on the alleged ground that its bill of complaint in the District Court presented only a constitutional question and did not present any question of the construction of any federal statutes or other federal question (p. 1, Appellee's petition for rehearing dated March 31, 1926, and "Point I", pp. 1–3, Appellee's "Brief on Petition for Rehearing and for Dismissal of Appeal" also dated March 31, 1926; certified copies of such petition and brief included in the "Certified copies of Briefs filed in the Circuit Court of Appeals" filed in this court herewith.

THAT WAS THE FIRST TIME THAT IT EVER APPEARS TO HAVE OCCURRED TO APPELLEE OR ITS COUNSEL TO CLAIM THAT ITS BILL OF COMPLAINT DID NOT INVOLVE QUESTIONS OF THE CONSTRUCTION OF FEDERAL STATUTES. IT WAS THEN TOO LATE. APPELLEE WAS THEN ESTOPPED TO MAKE SUCH A CLAIM.

It is submitted that a party cannot at such a late date deprive a court of jurisdiction by changing the whole theory of its case. Even if, in the first instance, in the trial court, the bill of complaint might have been said to be capable of being so read as to rest complainant's case solely upon the alleged consti-

tutional question,—and not to involve in any way the construction of the Organic Acts or other acts of Congress, and thus not to raise any federal questions other than the constitutional questions;—yet, complainant as well as appellee, and also the Judge of the District Court, having understood it to be intended to raise the other federal questions as well,—viz., of the construction of the federal statutes, the Organic Acts for Porto Rico and other acts of Congress,—and the defendant-appellant, the defeated party in the District Court, having in good faith on the strength of that understanding appealed to the Circuit Court of Appeals instead of to this court; and the complainant-appellee having in the Circuit Court of Appeals joined issue on the merits and specifically admitted in its brief, as hereinabove pointed out, that questions of the construction of federal statutes (as well as the alleged constitutional questions) were there involved, and having urged its construction of the Organic Acts and other federal statutes in that court as a ground for sustaining the decree of the District Court,—without any suggestion whatever of those questions not being there involved, or of the case having been wrongly taken to that court,—and appellee having been defeated in that court; *it cannot afterward,*—after having thus misled the opposing party, as well as the District Court, and the Circuit Court of Appeals on the first hearing, into believing that it intended to present questions of the construction of the federal statutes in its bill of complaint, and after having thus gotten the benefit of a decree in the District Court apparently based on that understanding, and after having also thus gotten the benefit of an argument and a trial in the Circuit Court of Appeals upon that theory,—and having been there defeated,—*now turn around and ask that everything thus done in the Circuit Court of Appeals be disregarded, and that it now have a new appellate review in this court,* upon the theory that it did not mean to present by its bill of complaint the questions of the construction of the federal statutes which it had nevertheless elaborately argued in the Circuit Court of Appeals.

IT IS SUBMITTED THAT A LITIGANT CANNOT THUS BLOW HOT AND BLOW COLD AT THE SAME TIME WITH THE FEDERAL COURTS

OF REVIEW. Section 238 of the Judicial Code was not intended as such a trap for an appellant.

POINT III.

APPELLEE ITSELF ADMITTED IN THE CIRCUIT COURT OF APPEALS THAT NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS HERE INVOLVED.

It deliberately admitted on page 5 of its original "Brief of Complainant-Appellee" in the Circuit Court of Appeals (certified copy herewith presented to this court as hereinbefore stated, referred to *ante*, Point II, p. 14 hereof; and portion headed "Applicability of Rule to Porto Rico", reprinted in Appendix I hereto, pp. 21-24, *infra*), that:

> "*It is admitted* that Congress with its power to extend or withhold the application of parts of the federal constitution in Porto Rico, CAN AUTHORIZE THE LEGISLATURE OF PORTO RICO TO TAX IMPORTS IN THE ORIGINAL PACKAGES."

In view of that express admission it is plain that the alleged "constitutional questions" purporting to be presented by the bill of complaint here are, in the language of this court in the *Heitler* case, "NOT SUBSTANTIAL BUT FRIVOLOUS."

> *Heitler* v. *United States*, *supra*, 260 U. S. 438, 439 (TAFT, CH. J.).

It is manifest that, on appellee's own statement in its own brief in the Circuit Court of Appeals in this case, it never really believed in them itself. The only substantial federal questions involved in the suit are those of the construction of the federal statutes, viz., of the former and the present Organic Acts of Porto Rico and the related acts of Congress,—which appellee argued in its original brief in the Circuit Court of Appeals, and as to which, as the Circuit Court of Appeals held in its opinion and decree of March 3, 1926, the requisite jurisdictional amount is not involved.

CONCLUSION.

It is therefore respectfully submitted that the Circuit Court of Appeals, First Circuit, erred in transferring this cause to this court, because:

(1) No substantial constitutional question is here involved;

(2) Even if it be held that a substantial constitutional question is involved, then other federal questions of the construction of statutes of Congress,—the Organic Acts of Porto Rico and other federal statutes,—are also involved; so that appellant had its *election* to take its appeal, as it did, to the Circuit Court of Appeals instead of to this court; and

(3) Appellee is estopped by its own conduct in the District Court, and in the Circuit Court of Appeals in its original brief in this case, from denying that it intended to present questions of construction of federal statutes (as well as constitutional questions) by its bill of complaint in this case.

This case should therefore be transferred back to the Circuit Court of Appeals, under the Act of September 14, 1922, and the saving clause in the jurisdictional act of February 13, 1925.

Salinger v. *United States*, 272 U. S. 542, 549.

Respectfully submitted,
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APPENDICES.

APPENDIX I. Excerpt from "Brief of Complainant-Appellee" in the Circuit Court of Appeals in this case.

APPENDIX II. Quotations from cases.

I. "Although a constitutional question may be involved; yet, if the case also involves other federal questions, the defeated party may elect whether to go to the Supreme Court or to the Circuit Court of Appeals."

II. "The mere assertion of a constitutional question is ineffective to sustain a direct appeal to the Supreme Court under Section 238, Judicial Code; unless the question thus presented be actually substantial, really arising under the facts alleged in the bill of complaint, and not foreclosed by previous decisions of the Supreme Court."

APPENDIX I.

EXCERPT FROM "BRIEF OF COMPLAINANT-APPELLEE" IN THE CIRCUIT COURT OF APPEALS IN THIS CASE (pp. 5-8 of the certified copy filed in this Court with this motion).

"APPLICABILITY OF RULE TO PORTO RICO.—We now reach the question of the difference, if any, between Porto Rico and a State of the Union.

"It is an academic question whether the violation is one of the Federal Constitution insofar as it is extended to Porto Rico or of the Organic Act insofar as it adopts parts of the Federal Constitution.

"It is admitted that Congress, with its power to extend or withhold the application of parts of the Federal Constitution in Porto Rico, can authorize the Legislature of Porto Rico to tax imports in the original packages. The first real question is whether Congress has granted to the Legislature of Porto Rico the power to lay a tax on imports from foreign countries.

"Certain sections of the Foraker Act and Jones Act, namely secs. 15, 32 and 38 of the Foraker Act and secs. 3, 37 and 57 of the Jones Act, vest certain legislative power in the Insular Legislature. Other sections, namely sec. 14 of the Foraker Act and secs. 9 and 58 of the Jones Act, extend federal laws to Porto Rico. These sections must be construed together.

Sections 15, 32 and 38 of the Foraker Act are quoted in appellant's brief, p. 28. Section 57 of the Jones Act is as follows:

> "'That the laws and ordinances of Porto Rico now in force shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the Legislative authority herein provided for Porto Rico or by Act of Congress of the United States; and such legislative authority shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify or repeal any law or ordinance, civil or criminal, continued in force by this Act as it may from time to time see fit.'

"Section 37 of the Jones Act is substantially the same as Section 32 of the Foraker Act. Section 3 of the Jones Act, insofar

as it is applicable to this case, is similar to Section 38 of the Foraker Act.

"None of these sections gives a blanket authority to the Legislature of Porto Rico. Section 15 of the Foraker Act must be understood as authorizing only such legislation as is not inconsistent with the Foraker Act. This limitation is specifically contained in Section 57 of the Jones Act.

"Sections 32 of the Foraker Act and 37 of the Jones Act limit the authority to 'matters of a legislative character not locally inapplicable.'

"Appellant argues, page 29, of brief, that Section 38 of the Foraker Act, and by implication Section 3 of the Jones Act, contains 'a general grant of power to levy taxes for local purposes.' This section is not a general grant. It does not cover duties on imports from the continental United States, prohibited by Section 3 of the Foraker Act as continued in force by Section 58 of the Jones Act. Nor does it cover duties on imports from foreign countries. Nor income taxes, which, even before 1913, Congress could have imposed in the territory of Porto Rico under the territorial clause of the Federal Constitution.

"The question is whether Congress by the words 'taxes and assessments on property' meant more than would be generally understood thereby in the continental United States and whether Congress intended to authorize taxes interfering with foreign commerce.

"For the answer to this question we must examine not merely the restrictions in Sections 15, 32 and 38 of the Foraker Act and in Sections 3, 37 and 57 of the Jones Act, but also those sections which extend federal laws to Porto Rico.

"Section 9 of the Jones Act, following Section 14 of the Foraker Act, reads in part:

> "'That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws • • • .'

"Section 58 of the Jones Act is as follows:

> " 'That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.'

"From the specific exception of internal revenue laws in Section 9 of the Jones Act, one would suppose that all other federal revenue laws were in force in Porto Rico. That is certainly so as to the federal tariff laws.

"Congress has apparently desired that the duties in Porto Rico and in the continental United States shall be uniform. Although the federal duties in Porto Rico go to the Insular Government the collection machinery is an integral part of the Customs Service of the United States and the federal tariff laws are applied in Porto Rico. Foraker Act, secs. 2, 3 and 4, continued by Jones Act, sec. 58. Congress certainly never intended that the Legislature of Porto Rico could impose additional import duties on top of the federal duties.

"Clause 2 of Section 8 of Article I of the Federal Constitution provides, in part:

> " 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws, • • • .'

"Although a more extended application has been given it by a century of judicial construction, this clause literally forbids only import taxes and export taxes. In the case of Porto Rico, Congress has covered the case of imports from foreign countries by providing, in Sections 2, 3 and 4 of the Foraker Act, for the application of the federal tariff acts. It covered the case of exports by the specific provisions of Section 38 of the Foraker Act and Section 3 of the Jones Act. What more should it rea-

sonably be required to do to indicate its intention that Porto Rico was to be limited in the same way as a State of the Union? Taxes on imports and taxes on exports are forbidden to States by Clause 2 of Section 8 of Article I of the Federal Constitution. Taxes on imports and taxes on exports are forbidden in Porto Rico by Sections 2, 3, 4 and 38 of the Foraker Act as continued by Section 58 of the Jones Act. The mere fact that different language is used in the Organic Act and the Federal Constitution is not significant. See *Kepner* v. *U. S.*, 195 U.S. 100 (1904), as to the Fifth Amendment.

"It was once argued that Clause 3 of Section 8 of Article I of the Federal Constitution did not apply to Porto Rico, but this Court answered that Congress never intended to give Porto Rico more power over its external commerce than a State of the Union would have. *Benedicto* v. *West India & Panama Cable Co.*, 256 Fed. 417 (C. C. A., 1st Circuit, 1919). The argument of appellant in the case at bar would have called for a contrary decision in the *Cable Company* case. The intention of Congress in the Organic Act and preceding federal statutes seems clearly to have been to put Porto Rico in the position of a State so far as that was reasonably possible. At least, Congress certainly never intended the Insular Government to have more power over matters affecting foreign commerce than a sovereign State of the American Union."

APPENDIX II.

QUOTATIONS FROM AUTHORITIES CITED.

I.

ALTHOUGH A CONSTITUTIONAL QUESTION MAY BE INVOLVED; YET, IF THE CASE ALSO INVOLVES OTHER FEDERAL QUESTIONS, THE DEFEATED PARTY MAY ELECT WHETHER TO GO TO THE SUPREME COURT OR TO THE CIRCUIT COURT OF APPEALS. (Par. D-(a), under "Point I," p. 8, of the foregoing Brief.)

"The first question which claims our attention relates to the jurisdiction of this court. Section 7 of the act of March 3, 1891, c. 517, 26 Stat. 828 (U. S. Comp. Stat. 1901, p. 550), which gives a right of appeal from an interlocutory decree granting or continuing an injunction or appointing a receiver, restricts it to cases 'in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals,' so the question resolves itself into this: Is the case one in which an appeal from a final decree may be taken under the act of 1891 to this court? The appellee insists that it falls within the exclusive appellate jurisdiction of the Supreme Court, because it involves the construction and application of the Constitution of the United States and draws in question the constitutionality of a law of the United States. We need not refer at length to the statutory provisions or the cases which are claimed to sustain this insistence * * *, because further consideration and discussion of the subject are foreclosed by the recent decision of the Supreme Court in *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407, 24 Sup. Ct. 376, 48 L. Ed. 496. That was a case in which diversity of citizenship did not exist, and where it was sought to recover certain moneys exacted and paid under protest as war revenue taxes, the right to their recovery being asserted upon the grounds that the act of Congress imposing them was violative of the Constitution, and that, even if valid, it did not, when rightly interpreted, authorize their collection. The contention was made that the judgment of the Circuit Court was not subject to review by the Circuit Court of Appeals, but only by the

Supreme Court. It was ruled otherwise. We quote from the opinion:

"Was the judgment of the Circuit Court subject to review only by this court, or was it permissible for the plaintiff to take it to the Circuit Court of Appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the Circuit Court. *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290, 295, 22 Sup. Ct. 452, 46 L. Ed. 546. But this case distinctly presented other questions which involved simply the construction of the act, and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely upon the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the act of 1891, and, consequently, could not have come here directly from the Circuit Court. As, then, the case, made by the plaintiff, involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court, although, if the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the Circuit Court of Appeals for a review of the whole case. Of course, the plaintiff, having elected to go to the Circuit Court of Appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the Circuit Court to this Court."

"As the present case, according to the bill exhibited in the Circuit Court, involves the proper construction of the statutes under which the fraud orders were issued and is not made to depend entirely upon the constitutional questions, it follows, from the decision to which we have just referred, that the case is one in respect of which the appellate jurisdiction of the Supreme Court is not exclusive, and that an appeal from the final decree may be taken to this court."

Harris v. Rosenberger, 145 Fed. 449, 451-452 (C.C.A. Eighth Cir.—VAN DEVANTER, J.; certiorari denied by Supreme Court, *same case*, 203 U. S. 591).

"From this analysis of the petition, it appears that the grounds relied upon by petitioner for his release involve, not only the constitutionality and validity of the act, but the construction and effect of state statutes, and the regularity and effect of proceedings taken to disqualify the petitioner from practicing on the reservation. If the case involved the constitutional validity of the act, or the construction or application of the Constitution of the United States, and nothing else, this court would have no jurisdiction of the appeal. It would have rested exclusively in the Supreme Court of the United States. *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407, 24 Sup. Ct. 376, 48 L. Ed. 496; *Harris v. Rosenberger*, 145 Fed. 449, 76 C.C.A. 225, 13 L. R. A. (N. S.) 762. But, as the case involves other questions not exclusively cognizable on appeal by the Supreme Court, the appellant had his election to bring it to this court, and it becomes our duty to entertain the appeal and dispose of it."

Hooper v. Remmel, 165 Fed. 336, 338 (C.C.A., Eighth Cir., ADAMS, J.).

II

THE MERE ASSERTION OF A CONSTITUTIONAL QUESTION IS INEFFECTIVE TO SUSTAIN A DIRECT APPEAL TO THE SUPREME COURT UNDER SECTION 238, JUDICIAL CODE; UNLESS THE QUESTION THUS PRESENTED BE ACTUALLY SUBSTANTIAL, REALLY ARISING ON THE FACTS ALLEGED IN THE BILL OF COMPLAINT, AND NOT FORECLOSED BY PREVIOUS DECISIONS OF THE SUPREME COURT. (Par. D-(b), under "Point I," pp. 8-9, of the foregoing Brief.)

"It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its

existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus in *Millingar v. Hartupee*, 6 Wall. 258, the Chief Justice (at page 261) said: 'Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power.' This case arose under the twenty-fifth section of the Judiciary Act, and jurisdiction was sought to be maintained upon the assertion that the validity of an authority exercised under the United States was drawn in question, and the decision was against its validity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion.

"In *New Orleans v. New Orleans Waterworks Company*, 142 U. S. 79, upon a motion to dismiss the writ of error on the ground that no Federal question was involved, it was said by the court (page 87):

'While there is in the amended and supplemental answer of the city a formal averment that the ordinance No. 989 impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free of charge, the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'

"Again, in *Hamblin v. Western Land Company*, 147 U. S. 531, upon a like motion to dismiss the writ of error, the court said: 'It is doubtful whether there is a Federal question in this case. A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgment of state courts,' citing the two cases just above referred to.

"In *St. Joseph & Grand Island Railroad Company v. Steele*, 167 U. S. 659, it was said by the court (page 662):

'We cannot accede to the proposition that, because the acts of Congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll bridge, the conceded power of the State to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in

the Circuit Court of the United States. Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real, substantive question, on which the case may be made to turn.'

"Although the above case relates to the jurisdiction of the Circuit Court, yet, so far as this question is concerned, the principle is the same as to both courts.

"And in *Wilson* v. *North Carolina*, 169 U. S. 586, it was held that there must be a real and substantial Federal question existing in order to give this court jurisdiction to review a judgment of a state court, and if the question raised were so unfounded in substance that the court would be justified in saying there was no fair color for the claim that it was of a Federal nature, the writ would be dismissed.

"These cases show the rule and its limitations, and where by the record it appears that although a claim of a Federal question had been plainly made, if it also clearly appear that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised was not sufficient to give this court jurisdiction.

"We must look at the question submitted by the plaintiff in error in the light of these decisions for the purpose of determining whether there is any fair foundation for the several claims."

New Orleans Waterworks Co. v. *Louisiana*, 185 U. S. 336, 344-346.

"From the foregoing it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below, without reference to its substantial foundation, determines the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real and not a merely formal Federal question is essential to the jurisdiction of this court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely

devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345, and authorities there cited."

Eq. Lf. Assur. Soc. v. *Brown*, 187 U. S. 308, 311 (WHITE, J.).

"It is settled that the mere averment of a constitutional question is not sufficient, where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason. *Fayerweather* v. *Ritch*, 195 U. S. 276, 299. We think that the alleged violations of Federal right based upon the Fourteenth Amendment were so unsubstantial and devoid of merit that they furnish no real support to the contention that the decree of the Circuit Court of Appeals was not final. From this it follows that the motion to dismiss must prevail."

Farrell v. *O'Brien*, 199 U. S. 89, 100-101.

"If the jurisdiction of the District Court was invoked on the ground of diversity of citizenship, and the averment as to a right arising under the Federal Constitution or statutes was unsubstantial and without real merit, either because of its frivolous character upon its face, or from the fact that reliance was based upon a claim of Federal or statutory right denied by former adjudications of this court, then the appeal to this court must be dismissed. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311."

Merriam Co. v. *Syndicate Publishing Co.*, 237 U. S. 618, 621 (DAY, J.).

"But mere reference to a provision of the Federal Constitution, or the *mere assertion of a claim under it, does not authorize this court to review* a criminal proceeding; and it is our duty to decline jurisdiction *unless the writ of error presents a constitutional question substantial in character* and properly raised below" (italics ours).

Sugarman v. *United States*, 249 U. S. 182, 184.

"These were writs of error issued directly to the District Court under Section 238 of the Judicial Code to

review sentences of fine and imprisonment on the ground that they were cases in which the constitutionality of the National Prohibition Act, under which the convictions were had, was drawn in question. In addition to the constitutionality of the Prohibition Act, the assignments of error raised many questions as to the admissions of evidence and the charge of the court. We held that in view of our previous decision affirming the validity of the Prohibition Act (*National Prohibition Cases*, 253 U. S. 350), the plaintiffs in error were precluded from raising the question again and basing thereon a claim of jurisdiction for a writ of error under Section 238, that the question made was, therefore, not substantial but frivolous, and that the writ should be dismissed for want of jurisdiction on the authority of *Sugarman* v. *United States*, 249 U. S. 182, 194, and cases cited. *Heitler* v. *United States*, *post*, 703. This conclusion made it impossible for us to consider the other errors assigned."

Heitler v. *United States*, 260 U. S. 438, 439 (TAFT, CH. J.); *cases transferred to the Circuit Court of Appeals*; *ib.*, *at pp.* 439-440).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 164

JUAN G. GALLARDO, TREASURER,
Defendant-Appellant,

—vs.—

SANTENI FERTILIZER COMPANY,
Complainant-Appellee.

Appeal from the District Court of the United States for the District of Porto Rico, transferred from the United States Circuit Court of Appeals for the First Circuit under the Act of September 14, 1922.

BRIEF OF APPELLEE IN OPPOSITION TO MOTION TO RETRANSFER TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

NELSON GAMMANS,
Solicitor for
Complainant-Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 840.

JUAN G. GALLARDO, TREASURER,
Defendant-Appellant,

—vs.—

SANTINI FERTILIZER COMPANY,
Complainant-Appellee.

BRIEF OF APPELLEE IN OPPOSITION TO MOTION TO RETRANSFER TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

STATEMENT OF THE CASE.

This is a motion filed by the defendant-appellant, the Treasurer of Porto Rico, for the retransfer to the United States Circuit Court of Appeals, First Circuit, of an appeal transferred by the Circuit Court of Appeals to this Court. The ground of the transfer by the Circuit Court of Appeals was that the appeal from the decree of the District Court should have been taken to this Court rather than to the United States Circuit Court of Appeals (R., 32-34).

The suit was instituted in the United States District Court for the District of Porto Rico by the complainant-appellee, a taxpayer, to enjoin the making and enforcing by the defendant-appellant of certain property tax assessments. The grounds upon which the assessments were

complained of were: first, that they covered foreign imports in the original packages in which imported by complainant from foreign countries, all in violation of the Federal Constitution; and, second, that they assessed complainant's stock of merchandise on hand January 15th, "tax day," instead of assessing the "average value" during the year preceding the assessment, as required by Article 294 of the Political Code of Porto Rico. There was no diversity of citizenship and the jurisdiction of the Court was based upon the constitutional question. The complainant alleged (Complaint, par. 3; R., 1) "that the amount in controversy in this suit exceeds the sum of $5,000, exclusive of interest and costs." This allegation was expressly admitted in the answer (Answer, par. 1; R., 9). No jurisdictional question was raised in the District Court. Nor was any federal non-constitutional question discussed, the entire argument as to imposts being based on *Brown vs. Maryland*, 12 Wheat. 419 (1827), and *Low vs. Austin*, 13 Wall. 29 (1871). The District Court entered a decree enjoining the enforcement of the assessments on both grounds (R., 16). The decree was entered March 31, 1925, and under Section 14 of the Act of February 13, 1925, the appeal was therefore governed by the law theretofore existing and more particularly by Section 238 of the Judicial Code, subdivision 3.

The defendant-appellant, perhaps overlooking Section 14 of the Act of February 13, 1925, took his appeal to the United States Circuit Court of Appeals, First Circuit, instead of taking a direct appeal to this Court. In the Circuit Court of Appeals oral argument was had on the merits and some time thereafter jurisdictional questions were raised by the Court *sua sponte* and supplemental briefs were called for. On the supplemental briefs and without oral argument, the Court on March 3, 1926 (R., 40), held that the constitutional question did not involve the jurisdictional amount and remanded with costs with instructions to the District Court to dismiss for want of jurisdiction, and without granting complainant the privi-

lege of amending in either court. Complainant-appellee then moved for a rehearing, pointing out various errors, including the disregard of *Berryman vs. Trustees of Whitman College*, 222 U. S. 334 (1912), and similar cases, and pointing out also that the Circuit Court of Appeals itself was without jurisdiction. After oral argument called for by that Court, the Circuit Court of Appeals on December 18, 1926 (R., 34), vacated its decree of March 3, 1926, and transferred the appeal to this Court. The ground upon which dismissal or transfer was asked in the Circuit Court of Appeals was that the sole question upon which the jurisdiction of the District Court was based was a constitutional one and that in such cases this Court had exclusive jurisdiction on appeal.

Where there is no diversity of citizenship and there are no federal non-constitutional questions and the only questions alleged (aside from the non-federal ones) relate to the construction or application of the Constitution, this Court and not the Circuit Court of Appeals has jurisdiction on appeal.

McMillan Co. vs. Abernathy, 263 U. S. 438 (1924);

Raton Water Works Co. vs. Raton, 249 U. S. 552 (1919);

Carolina Glass Co. vs. South Carolina, 240 U. S. 305 (1916);

Union & Planters' Bank vs. Memphis, 189 U. S. 71 (1903);

Holt vs. Indiana Mfg. Co., 80 Fed. 1 (C. C. A., 7th Circ., 1897).

The opposition in the Circuit Court of Appeals was based on the propositions that the constitutional question was frivolous and that federal non-constitutional questions were involved.

The appellant's brief on the present motion raises these same two points and adds one to the effect that by argu-

ing in the Circuit Court of Appeals certain alleged federal non-constitutional questions (there raised for the first time in the brief of the defendant-appellant), the complainant-appellee has accepted the jurisdiction of that Court or waived objection to the want of jurisdiction or is estopped from questioning the jurisdiction.

I.

THE CONSTITUTIONAL QUESTION WAS SUBSTANTIAL.

The constitutional question was whether the Legislature of Porto Rico could impose a property tax on imports in the hands of the importer in the original packages in which imported; in other words, whether *Low vs. Austin*, 13 Wall. 29 (1871) is applicable to Porto Rico. *Low vs. Austin* is based upon an immunity under the Federal Constitution. If the relevant clause of the Constitution applies to Porto Rico, the tax is invalid.

Paragraph 8 of the complaint (R., 2-3) alleged:

> "• • • all of which merchandise on January 15, 1923, was on the dock and warehouse of the complainant in the City of San Juan in the original bags in which same had been imported from Germany and France by complainant and which consequently retained its character of imports from foreign countries and was at the time exempt as such from any property or other taxes imposed or which could be imposed by the government of Porto Rico."

Paragraph 13 of the complaint alleged (R., 5):

> "Said acts done or threatened to be done are furthermore illegal and without warrant of law in that said Political Code as construed by the taxing

> officers of the government purports to tax goods imported from foreign countries while still in the original packages in the hands of the original importer and before the same have become mingled in the commerce of the Island of Porto Rico; all of which is in violation of the Constitution of the United States, and especially of paragraph 3 of Section 8 of Article I thereof."

It should be noted that the words "that is to say, of the 'commerce clause'" at the end of the quotation on page 6 of appellant's brief, are not a part of the quotation.

It may perhaps have been better pleading to have specified Article I, Section 10, Clause 2, of the Constitution as well as Article I, Section 8, Clause 3, but we submit this was not essential. The assessment is alleged to have been in violation of the Federal Constitution and defendant could have been in no doubt as to the grounds of objection in view of the pleading that part of the merchandise "on January 15, 1923, was on the dock and warehouse of the complainant in the City of San Juan in the original bags in which same had been imported from Germany and France by complainant and which consequently retained its character of imports from foreign countries and was at the time exempt as such from any property or other taxes imposed or which could be imposed by the government of Porto Rico" and in view of the pleading that defendant for the year subsequent "threatens to include in said assessment merchandise in the hands of complainant on January 15, 1924, in the original packages in which the same has been imported by complainant from foreign countries and which has not yet become mingled in the local commerce of Porto Rico."

Brown vs. Maryland was decided on both the "commerce clause" and the "imports clause" and *Low vs. Austin* apparently on the "imports clause" alone.

The appellant now seems to disregard the very existence of the "imports clause" and in the Circuit Court of Ap-

peals attempted to dispose of it by arguing that Porto Rico is clearly not a "State." The question can not be disposed of in this summary fashion.

See:

Stoutenburgh vs. Hennick, 129 U. S. 141 (1889);
Hartley vs. Kansas City So. Ry. Co., 187 U. S. 617 (1903);
Geofroy vs. Riggs, 133 U. S. 258 (1890);
Talbott vs. Silver Bow County, 139 U. S. 438 (1891);
Downes vs. Bidwell, 182 U. S. 244 (1901), per Mr. Justice Brown;
The Abercorn, 26 Fed. 877, aff'd 28 Fed. 384 (Circ. Ct., Oregon, 1886).

Mr. Justice Brewer, delivering the opinion of this Court in *Talbott vs. Silver Bow County*, *supra*, said at page 444:

> "Still further, while the word State is often used in contradistinction to territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those policial communities known as States of the Union. Such a use of the word State has been recognized in the decisions of this Court."

The commerce clause likewise may cover commerce between Porto Rico and foreign countries in spite of the fact that Porto Rico for many purposes is not technically a "State."

See

Hartley vs. Kansas City So. Ry. Co., 187 U. S. 617 (1903).

The raising of the constitutional question is justified by decisions of this Court, by a subsequent decision of the Circuit Court of Appeals, First Circuit, and by the decree herein in the District Court.

This Court has held that certain sections of the Constitution are applicable *proprio vigore* in Porto Rico. Mr. Justice White in *Downes vs. Bidwell*, 182 U. S. 244, 289 (1901) repudiated the idea that Congress has power to extend or withhold the application of the Constitution to Porto Rico.

At page 292, he said:

> "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."

This opinion "has become the settled law of the court."

> *Balzac vs. Porto Rico*, 258 U. S. 298, 305 (1922); *Dorr vs. United States*, 195 U. S. 138, 143, 147 (1904).

In *Balzac vs. Porto Rico*, Mr. Chief Justice Taft, delivering the opinion, said at page 312:

> "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. • • • The real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were *applicable* by way of limitation upon the exercise of executive and legislative power *in dealing with new conditions and requirements*." (Italics ours.)

In other words, whether a constitutional provision is applicable or not to Porto Rico depends on the status of the Island, its relationship to the United States, and its conditions and requirements. This will be referred to hereinafter.

The Fifth Amendment is said to be applicable in Porto Rico.

> *Downes vs. Bidwell*, 182 U. S. 244 (1901);
> *Ochoa vs. Hernandez*, 230 U. S. 139 (1913);
> *Balzac vs. Porto Rico*, 258 U. S. 298, 312, 313 (1922).

The purpose of the constitutional provisions relating to commerce (Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2) was to secure uniformity. The framers of the Constitution must have thought every possibility was covered by the phrase "commerce with foreign nations, and among the several States, and with the Indian Tribes" and could not have intended to except other governmental bodies within or without the Union.

Under a system whereby the Federal Government includes Porto Rico within the customs barriers of the Union (unlike the Virgin Islands), there is as much need for uniformity in the case of Porto Rican "commerce with foreign nations" as in the case of New York "commerce with foreign nations." Porto Rico must therefore be included within the scope of the "commerce clause" (Art. I, Sec. 8, clause 3) and the imports provision (Art. I, Sec. 10, clause 2).

Whether the "imports clause" is applicable to Porto Rico has not been decided by this Court, nor has this Court passed on the applicability of the "commerce clause" to foreign commerce since the status of Porto Rico created by its entry into the American customs system.

In any case, however, these decisions certainly repudiate the appellant's proposition (p. 31 of appellant's brief in the Circuit Court of Appeals):

> "That the Constitution of itself does not apply to Porto Rico is too well settled to require discussion;"

and repudiate appellant's proposition (p. 10 of brief in this court):

> "The validity of its" (Porto Rico's) "acts, therefore, in so far as the questions presented by the facts alleged in this bill are concerned, is to be determined, not by a consideration of any of the clauses of the Constitution defining the correlative powers of the Federal Government and of the States, *but solely by an examination of the Organic Act for Porto Rico and other acts of Congress* • • •." (Italics ours.)

The Circuit Court of Appeals for the First Circuit, in the *Porto Rico Tax Appeals*, 16 Fed. (2d) 545, on January 7, 1927, held:

> "*Brown vs. Maryland* is applicable to importations from foreign countries sold by the importers in the original packages, and the taxes as to such importations so sold must be enjoined."

Low vs. Austin, 13 Wall. 29 (1871), relating to property taxes, as in the case at bar, is based upon the principles of *Brown vs. Maryland*, involving license taxes. The decision that *Brown vs. Maryland* is applicable to Porto Rico means that the Circuit Court of Appeals for the First Circuit considers *Low vs. Austin* likewise applicable.

The District Court in its decree in this case sustained the appellee's claim that the property tax on goods in original packages is invalid (R., 17). In none of its fourteen assignments of error does the appellant even assign as error this holding of the District Court (R., 18-20). The failure to mention the question in the opinion and in

appellant's assignment of errors shows that the proposition was practically conceded by counsel below and that the real contest was on the question of "average value." In the Circuit Court of Appeals the constitutional question was discussed at length in the briefs of both parties on appeal and orally at some length by counsel for both parties, a discussion into which members of that Court entered. In view of all this we must assume that the constitutional question was seriously raised and is not "frivolous."

The argument of the defendant-appellant reduces itself to the proposition that a claim sustained in the decree of the District Court, not questioned in the assignment of errors, approved by the Circuit Court of Appeals in an analogous case, and in line with the reasoning of this Court in several cases, is not only unsound but frivolous.

II.

NO FEDERAL NON-CONSTITUTIONAL QUESTION IS INVOLVED.

Subdivision 3 of Section 238 of the Judicial Code provided for a direct appeal to this Court

> "in any case that involves the construction or *application* of the Constitution of the United States."

What questions are involved are to be determined from the pleadings, not by what the defeated party thinks could possibly have been alleged by his adversary. It is the party raising the question who determines the nature of the case.

> *The Fair vs. Kohler Die Co.*, 228 U. S. 22 (1913);
> *Smith vs. Kansas City Title Co.*, 255 U. S. 180 (1921);
> *McMillan vs. Abernathy*, 263 U. S. 438 (1924), *semble;*

Lemke vs. Farmers' Grain Co., 258 U. S. 50 (1922), *semble;*
Chappell vs. U. S., 160 U. S. 499 (1896);
Boske vs. Comingore, 177 U. S. 459 (1900);
McCurdy vs. U. S., 246 U. S. 263 (1918).

As Mr. Justice Holmes said in delivering the opinion in *The Fair vs. Kochler Die Co.*, 228 U. S. 22 (1913), at pages 24-25:

> "Obviously the plaintiff sued upon the patent law, so far as the purport and intent of the bill is concerned. * * *
>
> Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill."

The nature of the "*case*" depends on the complaint and not on considerations suggested by the ingenuity of counsel on appeal. To go into these considerations would be to allow defendant at this time to rewrite complainant's complaint and to change the nature of the "*case*" as one "involving the construction or application of the Constitution."

Whether or not it would have been better pleading to have alleged specifically violation of the "imports clause" as well as of the "commerce clause", the fact remains that the only ground of invalidity stated in the complaint is that the tax "is in violation of the Constitution of the United States." There is not one word in the pleadings about any other federal question.

Paragraph 8 of the complaint (R., 3) alleges that the part of the stock in trade which consists of imported goods

> "retained its character of imports from foreign countries and was at the time exempt as such from any property or other taxes imposed or which could be imposed by the Government of Porto Rico."

All that this means is that such property is exempt from existing or future property taxes. The reason for the exemption is the constitutional one stated in paragraph 13 of the complaint.

The appellant argues (R., 11-12) that the appellee could have pleaded violations of the Organic Act, yet the appellant goes on (R., 16) to question the soundness of such suggested federal non-constitutional questions. In appellant's brief before the Circuit Court of Appeals (pp. 28-30 of that brief) appellant argued at length that there is nothing in the Organic Act to exempt imports from Insular taxes. Appellant's argument seems to be that any federal question which might plausibly have been raised is involved in a case, although not in fact raised in the pleadings and although unsound in substance.

The reiterated statement of appellant that Federal non-constitutional questions are involved deserves some specification of the Federal non-constitutional questions said to be involved. The Organic Act, to the best of our knowledge, in fact contains no direct limitation of taxes on imports. True, the provisions of the Organic Act were mentioned in argument, but their importance is to show the applicability of the constitutional provision.

We do not say that the Organic Act need be totally disregarded. As Mr. Justice White said in *Downes vs. Bidwell*, 182 U. S. 244 (1901), at pages 293, 294:

> "The determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the *situation* of the territory and its *relations to the United States*. * * * The *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned * * *." (Italics ours.)

And as stated by Mr. Justice Day in *Dorr vs. United States*, 195 U. S. 138 (1904) at page 142:

> "The limitations which are to be applied in any given case involving territorial government must depend upon *the relation of the particular territory to the United States.*" (Italics ours.)

So also, Mr. Chief Justice Taft in *Balzac vs. Porto Rico*, 258 U. S. 298 (1922), as appears at pages 311-312, entered into an examination of many statutes, postal, customs, navigation, bankruptcy, banking, etc., to determine whether the status of the Island was such that the Sixth Amendment was applicable.

Whether Porto Rico is within the American customs system and similar considerations all bear on its status. This does not mean, however, that the constitutional question is any the less exclusively involved. The appellant's proposition may be that all constitutional questions in Porto Rico are also questions arising under the Organic Act because the latter, section 58, incorporates all Federal laws (including presumably the Constitution and treaties) not locally inapplicable. Were that sound, there could have been no exclusively constitutional question in Porto Rico.

To a certain extent the provisions of the Constitution are adopted by implication in every State constitution, but one would hardly argue that there are no more federal constitutional questions which can be taken from the highest courts of the various States to this Court.

Whether we adopt the theory that the Constitution applies *proprio vigore* when the status warrants or the discredited theory that it applies only when Congress extends it, the legislation of Congress in creating the status or extending the Constitution must be examined. To say that ordinary federal questions are thus involved in addition to those of the construction or *application* of the Constitution would mean that subdivision 3 of Section 238 of the Judicial Code would be inapplicable to Porto Rico.

A good deal is said, in appellant's brief, about the form of the decree. Section 238 refers to the "case", not to

the decree. Every decision goes into an analysis of the pleadings, not of the decree. It is said to be significant that the decree said nothing of unconstitutionality. Appellant argues (appellant's brief, pp. 11-13) that because the reasoning of the District Court was not recited in the decree, it must be assumed that the Court's reasons were other than those pleaded and argued. Complainant alleged and argued unconstitutionality. The District Court decreed the tax invalid. The argument is that because the decree did not recite unconstitutionality as the reason, the reason must have been some other federal ground not pleaded nor argued. We are asked to assume that the Court below decided on a ground not advanced in the pleadings and not mentioned in the decree. We assume that no argument in answer to this is necessary. It seems much more reasonable to suppose that the reason the District Judge failed to discuss the question in his opinion and the reason the defendant-appellant failed to raise the question in the assignments of error was that the ground of the relevant part of the decree was considered obvious.

III.

OBJECTION TO THE WANT OF JURISDICTION OF THE CIRCUIT COURT OF APPEALS IS NOT WAIVED NOR IS COMPLAINANT-APPELLEE ESTOPPED.

The proposition of the appellant seems to be that the appellee by arguing certain alleged federal questions in the Circuit Court of Appeals (not in the District Court) has waived the want of jurisdiction of the Circuit Court of Appeals.

Certain passages from the appellee's brief in the Circuit Court of Appeals are quoted by appellant. These must be considered in their context. All references to the Organic Act were in answer to the appellant's arguments (pp. 24-30 of his brief in the Circuit Court of Appeals) that Congress has absolute power over Porto Rico and that

Congress had authorized certain taxes. In endeavoring to meet appellant on a common ground for argument, the appellee in its brief below may have gone too far in concessions for the sake of argument.

Under the doctrine that the Constitution applies *proprio rigore* where applicable to the situation, a full discussion of the Organic Acts of Porto Rico was necessary to determine just what the status of Porto Rico was, and whether it was outside the customs system or within that system. Under the discredited theory that the Constitution applies only when Congress extends it, a theory apparently held by defendant-appellant, a discussion of federal statutes is necessary to discover whether a particular part of the Constitution has been extended.

If in the District Court the only question were a constitutional one and this Court had exclusive jurisdiction on appeal, how could any proceedings before another court without jurisdiction affect the jurisdiction of this Court?

We further submit that the briefs in the Circuit Court of Appeals are no part of the pleadings or record and should be entirely disregarded. They are no more binding than oral argument. If any briefs are to be considered in determining what questions were involved, the briefs before the *District Court* are material. The Court will notice that these have not been filed *nor mentioned*. The fact is that neither in the briefs nor on the oral argument before the District Court was the Organic Act mentioned or federal non-constitutional questions discussed.

We trust that the Court will not receive an erroneous impression of the proceedings in the District Court from remarks in the appellant's brief not justified by the record nor by the facts *dehors* the record.

It is said at page 3 of appellant's brief:

> "The appeal was thus taken to the Circuit Court of Appeals * * * because appellant understood appellee's bill of complaint as well as the decree of

> the District Court to proceed upon the theory that the tax in question was violative of the federal Organic Acts for Porto Rico * * * and other related federal statutes,—as well as upon appellee's alleged constitutional rights under the United States Constitution."

If the defendant-appellant had any such misunderstanding, it was not justified by anything done or said in the District Court. The complaint did not mention federal non-constitutional questions; the argument in the District Court was based only on *Brown vs. Maryand* and *Low vs. Austin;* the decree did not mention any federal non-constitutional questions; nor did the assignment of errors mention any federal questions, constitutional or non-constitutional. The Organic Act was not mentioned in any court until sections thereof were discussed in *appellant's* brief in the Circuit Court of Appeals. We submit that appellant in taking his appeal in the District Court could not have been misled by anything which took place subsequently in the Circuit Court of Appeals.

On page 17 of his brief, appellant intimates that the appellee has misled the appellant, the District Court, and the Circuit Court of Appeals by letting them assume that federal non-constitutional questions were involved. As to the appellant, if he were misled by anything in the Circuit Court of Appeals, it was long subsequent to his having made the mistake of going to the wrong court. As to the District Court, it must be assumed that the Court granted the decree on the only ground mentioned in the complaint. As to the Circuit Court of Appeals, that Court itself is the best judge of whether it was "misled." That Court in its opinion (R., 38) of March 3, 1926, written while that Court was still unaware of its want of jurisdiction, said:

> "No provision of the 'Jones Act' or of the Customs Laws is set out or alleged in the plaintiff's bill as a ground of Federal jurisdiction."

And in its opinion (R., 33) of December 18, 1926, it stated:

> "The jurisdiction of the District Court was invoked solely upon the ground that the controversy involved the construction or application of the Constitution of the United States. As according to the allegations of the bill, the jurisdiction of the District Court was invoked upon the ground that the controversy involved the construction or application of the Constitution *and that alone*, this court is without jurisdiction to entertain the appeal, for in such cases an appeal lies only to the Supreme Court." (Italics ours.)

That Court, even though it had no jurisdiction to pass on the merits of the appeal, was entirely familiar with the proceedings before it and apparently saw nothing in them to justify any alleged waiver, estoppel or consent to jurisdiction.

Perhaps too much attention has been devoted to these questions of waiver or estoppel. It is difficult to understand how a federal appellate court can have jurisdiction conferred upon it by litigants. A rule of law that jurisdiction can be conferred by acquiescence of the parties litigant would result in the inability of this Court to dismiss appeals *sua sponte* where it clearly has no appellate jurisdiction and would force it to hear all appeals in which both parties wish a decision by this Court.

CONCLUSION.

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THIS COURT HAD EXCLUSIVE JURISDICTION OVER THE APPEAL AND THAT THE CIRCUIT COURT OF APPEALS COMMITTED NO ERROR IN TRANSFERRING THE CASE TO THIS COURT. THE MOTION TO RETRANSFER THE CASE TO THE CIRCUIT COURT OF APPEALS SHOULD BE DENIED.

Respectfully submitted,

NELSON GAMMANS,
Solicitor for Complainant-Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 164.—October Term, 1927.

Juan G. Gallardo, Appellant, *vs.* Santini Fertilizer Company.	Appeal from the District Court of the United States for the District of Porto Rico, transferred from the United States Circuit Court of Appeals for the First Circuit under the Act of September 14, 1922.

[October 24, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought in the District Court of Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. An injunction was issued by the District Court, on March 31, 1925. On April 7, 1925, an appeal was allowed to the Circuit Court of Appeals for the First Circuit. That Court at first made a decree reversing the decree of the District Court, but later, on December 18, 1926, set that decree aside and transferred the case to this Court, under the Act of September 14, 1922, c. 305; 42 Stat. 837, conceiving that the jurisdiction of the District Court was invoked solely upon the ground that the controversy involved the construction or application of the Constitution of the United States. On March 4, 1927, the Act of Congress was passed that took away the jurisdiction of the District Court in this class of cases, as explained in *Smallwood* v. *Gallardo, supra*.

The case has been argued upon the merits and also upon a motion to remand it to the Circuit Court of Appeals on the ground that the appeal properly was taken to that Court. As the only jurisdiction remaining anywhere is to make an order requiring the case to be dismissed for want of jurisdiction we need not discuss these matters. The decision that no jurisdiction remains comes from this Court, and it is proper that it should carry out its decision without unnecessary circuity by directing it to be enforced.

Decree reversed.
Bill to be dismissed for want of jurisdiction.

Mr. Justice Sutherland was absent.